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In the Supreme Court of the United States

OCTOBER TERM, 1978

CYRUS VANCE, SECRETARY OF STATE, APPELLANT

v.

LAURENCE J. TERRAZAS

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE APPELLANT

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BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-16a) is reported at 577 F.2d 7. The opinion of the district court (J.S. App. 19a-30a) is not reported. The opinion of the Board of Appellate Review of the Department of State (J.S. App. 31a-61a) is not reported.

JURISDICTION

The judgment of the court of appeals (J.S. App. 17a-18a) was entered on May 26, 1978. A petition

for rehearing was denied on August 24, 1978 (J.S. App. 62a). The notice of appeal was filed on September 22, 1978 (J.S. App. 63a-64a). On November 10, 1978, Mr. Justice Stevens extended the time for docketing the appeal to and including December 21, 1978. On December 21, 1978, the Chief Justice further extended the time for docketing the appeal to and including January 20, 1979. The jurisdictional statement was filed on January 20, 1979, and probable jurisdiction was noted on March 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person * * * be deprived of life, liberty, or property, without due process of law * * *.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

8 U.S.C. 1481(c) provides:

> Whenever the loss of United States nationality is put in issue in any action or proceeding * * * under, or by virtue of, the provisions of this chapter or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Except as otherwise provided in subsection (b) of this section, any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

QUESTIONS PRESENTED

1. Whether proof of specific intent to surrender United States citizenship is required before a citizen can be found to have voluntarily relinquished that citizenship.

2. Whether the provision of 8 U.S.C. 1481(c) that the burden of proving loss of nationality shall be met by a preponderance of the evidence is constitutional.

3. Whether the provision of 8 U.S.C. 1481(c) that an act of expatriation is presumed voluntary unless involuntariness is proved by a preponderance of the evidence is constitutional.

STATEMENT

1. Appellee was born in Maryland on December 13, 1947 (Tr. 10, 35-36). His father was a citizen of Mexico and his mother was a citizen of the United

States. Appellee was thus both a citizen of Mexico under the laws of that country and a citizen of the United States under the Fourteenth Amendment (J.S. App. 2a).

In the fall of 1970, while a student at the Colegio Commercial Ingles in Monterrey, Mexico, appellee, then 22 years old, applied for a Certificate of Mexican Nationality. The application contained the following statement printed in Spanish (A. 5a)[1]:

> I therefore hereby expressly renounce ———— citizenship, as well as any submission, obedience, and loyalty to any foreign government, especially to that of ————, of which I might have been subject, all protection foreign to the laws and authorities of Mexico, all rights which treaties or international law grant to foreigners; and furthermore I swear adherence, obedience, and submission to the laws and authorities of the Mexican Republic.

The blank spaces in the statement were filled in with the words "Estados Unidos" (United States) and "Norteamerica" (North America), respectively.[2] The signed application was submitted to the Mexican government on November 16, 1970.

[1] "A." refers to the Appendix to this brief. On June 11, 1979, the Court granted our motion to dispense with a joint appendix.

[2] It is not clear from the evidence whether the blanks were filled in when appellee signed the application. Compare J.S. App. 32a-33a, 21a, 3a.

On April 13, 1971, appellee was issued a Certificate of Mexican Nationality[3] (A. 8a-9a) which certified that appellee

> has furthermore sworn adherence, obedience, and submission to the laws and authorities of the United Mexican States, and has expressly renounced all rights inherent to any other nationality, as well as all submission, obedience, and loyalty to any foreign government, especially to those which have recognized him as that national.

Appellee admitted that he read and understood this certificate when he received it (J.S. App. 21a).

On August 30, 1971, about four months after receiving his Certificate of Mexican Nationality, appellee went to the United States Consulate in Monterrey and met with Wesley Parsons, a consular officer. According to Parsons, appellee stated that he wanted "a determination of some kind on his citizenship, that he felt he was both a Mexican and an American citizen, but he felt more Mexican than American[,] * * * that he intended to stay in Mexico, and that it was his impression that it was somehow illegal or

[3] The Mexican Government considers the declaration or allegiance to Mexico executed in connection with an application for a Certificate of Mexican Nationality to be effective upon issuance of the Certificate, which constitutes full proof of Mexican nationality (G. Ex. 55; Tr. 132). Based upon this policy, the Department of State regards the declaration of allegiance to Mexico to affect United States nationality when the Certificate of Mexican Nationality is issued, not when the declaration is made. Cf. III G. Hackworth, *Digest of International Law* 218 (1942).

against the laws of the United States for him to maintain both citizenships" (Tr. 172). Parsons explained that dual nationality was not illegal or improper under American law but warned appellee against obtaining a Certificate of Mexican Nationality (Tr. 176-177). When appellee stated that he already had obtained one, Parsons replied that he had probably expatriated himself (Tr. 177). Appellee appeared surprised, but relieved, and requested that Parsons notify his draft board in Illinois that he was no longer an American citizen (Tr. 178, 184).[4] Parsons explained that he could not do so because any loss of citizenship must be authoritatively determined by the Department of State, and he provided appellee with the appropriate forms for obtaining that determination (Tr. 178, 188, 307-308).[5] The next day, appellee returned to the Consulate with a letter he had written to his draft board stating that he was no longer an American citizen. He asked Parsons to sign and mail it, but Parsons refused to do so (Tr. 189-190).

On November 15, 1971, at the Consulate, appellee submitted the completed citizenship forms that Parsons had given him in August, so that a determination

[4] Appellee's hardship deferment had expired four days earlier (J.A. App. 36a). He was reclassified 1-A in November 1971 (*ibid.*).

[5] Appellee did not indicate during this meeting with Parsons that he had obtained the Certificate of Mexican Nationality involuntarily or mistakenly or that he wished to surrender it or to limit its effect (Tr. 183-184).

of his citizenship status could be made (Tr. 193-208). Among other documents, appellee signed an affidavit of an expatriated person (A. 30a), swearing that he had declared allegiance to Mexico freely and voluntarily, that "no influence, compulsion, force, or duress was exerted upon me by any other person" and that his oath of allegiance was "done with the intention of relinquishing my United States citizenship" (*ibid.*).[6] On December 21, 1971, the State Department issued a Certificate of Loss of Nationality (A. 31a-32a).

After he received the certificate, appellee called Parsons and inquired whether he could regain his American citizenship. Parsons advised him that he could appeal the administrative determination of loss of nationality (Tr. 208). Appellee appealed to the Board of Appellate Review of the Department of State, which affirmed the administrative finding of expatriation and denied appellee's application for a United States passport (J.S. App. 31a-61a).

[6] In a letter also submitted on that date, appellee stated that his oath of allegiance to Mexico "was a voluntary personal act on my behalf * * *" (A. 27a). Similarly, in a citizenship questionnaire appellee stated that he had "willingly" sworn allegiance to Mexico and had made no attempt to avoid taking the oath (A. 12a, 15a). On the other hand, appellee answered "no" to the written question, "Did you intend by this oath, or affirmation, to abandon your allegiance to the United States, or transfer your allegiance to the foreign state?" (A. 16a). And, in a separate statement, he said: "By taking this oath I did not consider that I was relinquishing my rights as an American citizen" (A. 13a).

2. Appellee thereafter brought this action under 8 U.S.C. 1503(a)[7] in the United States District Court for the Northern District of Illinois, seeking a declaratory judgment that he is a United States citizen. After a non-jury trial, the district court held that the government had proved by a preponderance of the evidence that appellee had declared his allegiance to Mexico (J.S. App. 20a-21a), which is an expatriating act under 8 U.S.C. 1481(a)(2), and that appellee's evidence was insufficient to rebut the presumption of voluntariness in 8 U.S.C. 1481(c) (J.S. App. 22a).

The district court stated that "[t]he sum of [appellee's] activities compels the conclusion that his oath of allegiance to Mexico was voluntary, and understandingly made as was his abandonment of United States citizenship" (J.S. App. 26a). In making this determination, the district court relied on appellee's signed application for a Certificate of Mexican Nationality, his own prior statements that his oath of allegiance to Mexico was voluntary, and the following evidence (*ibid.*):

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[7] 8 U.S.C. 1503(a) provides:

> If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under [the Declaratory Judgment Act] against the head of such department or independent agency for a judgment declaring him to be a national of the United States * * *.

Mr. Parsons testified that when plaintiff first visited the United States Consulate in 1971, he sought a determination of his United States citizenship status so that he could advise the draft board that he was no longer an American citizen (Tr. 178). The evidence also reveals that at the time of plaintiff's Application he was eligible for induction into the United States military, (Tr. 580), having taken a physical examination on September 14, 1970, (Tr. 76; See also, Def. Ex. #13), and raises serious questions regarding plaintiff's "flouting of obligations inherent in American citizenship." *Jalbuena* v. *Dulles*, 254 F.2d 379 (3rd Cir. 1958).

Finally, the evidence adduced at trial indicates that, *inter alia*, plaintiff "loved Mexico and felt more Mexican than American", (Tr. 172, 269, 270, 349; Def. Ex. 14); that he intended to live permanently in Mexico, (Def. Ex. 14, 15; Tr. 172, 349, 351); that he intended to marry a Mexican woman, (Def. Ex. 15, 21; Tr. 349); that he registered for the Mexican military (Tr. 121, 128-129); that he registered with the Mexican Social Security Board (Def. Ex. 44(a), Tr. 128); and that he represented himself as a Mexican citizen and applied for and received a Mexican passport, (Tr. 125, 149, 150, 575; Def. Ex. #1).

3. The court of appeals reversed (J.S. App. 1a-16a). It stated: "Assuming that the proper standards were applied, we are convinced that the record fully supports the [district] court's findings" (*id.* at 8a). But the court found it necessary to evaluate the "constitutional appropriateness" of Section 1481(c)

(*ibid.*). The court reasoned that because Congress cannot impose expatriation on a citizen (*Afroyim* v. *Rusk*, 387 U.S. 253 (1967)), "the issue becomes whether Congress nonetheless retains the power to legislate as to the evidentiary standard for voluntariness or whether instead that term must be defined constitutionally" (J.S. App. 9a). It held that it would be "inconsistent with the spirit of *Afroyim* to conclude that Congress somehow retains the power to define in the way it has here the conditions under which an individual is said to have relinquished voluntarily that citizenship" (*ibid.*) and that to "adopt blindly" Congress' allocation in 8 U.S.C. 1481(c) of the burden of proof in nationality cases "would be to grant indirectly to Congress power over an individual's citizenship that *Afroyim* held that it could not exercise directly" (J.S. App. 10a).

The court of appeals concluded that the government must prove loss of nationality by "clear, convincing and unequivocal" evidence (J.S. App. 11a). It found that standard required by the Fourteenth Amendment as "the minimum burden of proof that can satisfactorily guarantee that the individual's interest in the retention of his citizenship is protected adequately" (*id.* at 14a). The court therefore remanded the case to the district court for further proceedings under that standard (*id.* at 14a-16a).

SUMMARY OF ARGUMENT

Expatriation has traditionally been an "inherent right" of Americans, enabling them to sever their ties to the country of their former nationality or to

this country. Until 1967, expatriation was also considered a sanction that Congress could impose on a citizen in the exercise of its other constitutional powers, so long as no independent constitutional right of the individual was violated. See *Perez* v. *Brownell*, 356 U.S. 44 (1958); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). In 1967, however, the Court held in *Afroyim* v. *Rusk*, 387 U.S. 253, that the Fourteenth Amendment defines a citizenship for the native born and the naturalized that Congress has no power to strip away. Citizenship, the Court stated, could be lost only if "voluntarily relinquishe[d]." *Id.* at 268.

1. The first question in this case is whether, as the court of appeals held, citizenship cannot be lost under any circumstances unless the individual specifically intends to give it up, or whether, as we believe, citizenship may be relinquished regardless of the individual's subjective intent to do so, if he voluntarily commits an act, defined by statute as expatriating, that is so inherently inconsistent with continued allegiance to the United States that a judgment of expatriation is merely a formal recognition of what has, in effect, already happened. The expatriation cases that preceded *Afroyim* explicitly recognized this latter principle, and the dissenting opinion of Chief Justice Warren in *Perez* v. *Brownell*, *supra*, 356 U.S. at 67, discusses it at length. That opinion was the foundation of *Afroyim*, which overruled *Perez*, and an analysis of *Afroyim* ineluctably leads

to the conclusion that the Court did not intend to cast any doubt on the principle's continued validity.

There are substantial reasons why the Court should not now hold that specific intent is required as a condition of expatriation, so long as the individual voluntarily performs a statutorily defined act that unequivocally manifests a transfer or dilution of his allegiance to this country. The government has a compelling interest in knowing with certainty who is a citizen and who is not, so that the demands of citizenship, such as taxes and military service, may be exacted only from citizens and so that the many benefits of citizenship, at home and abroad, may be extended only to those who are entitled to them. Indeed, this interest complements the citizen's own interest in being able to ascertain with assurance what actions he may take without endangering his citizenship and what actions will constitute a relinquishment of that citizenship.

The government's interest is disserved if expatriation requires a judicial showing of specific intent, because such a requirement would effectively enable a citizen to give up his citizenship when that suits his purposes but to reclaim it at some future time by testifying that, despite all appearances, he had never specifically intended to surrender it. The only interests that would be served by such a requirement are the interest of a citizen who wishes to shift his allegiance but at the same time to retain formal American citizenship for some future advantage, and the interest of a citizen who intentionally plots

an ostensible expatriation for some temporary advantage in full knowledge that the government would have no effective way of enforcing it once the individual's need for the advantage has passed. Neither interest is legitimate or deserves protection, and they surely do not outweigh the government's interest in knowing who is a citizen and who is not.

The facts of this case clearly demonstrate the problems created by the court of appeals' approach. Appellee has voluntarily committed an act defined by statute as expatriating (*i.e.*, taking an unequivocal oath of allegiance to another country); this act so inherently demonstrates a transfer of allegiance that he should be held to have expatriated himself. Yet appellee now asserts that he did not intend at the time he took the oath to transfer his loyalty or to relinquish his American citizenship. The court of appeals erred in requiring the government to rebut these assertions and to prove instead that appellee actually intended to surrender his citizenship when he took the oath of allegiance to Mexico.

2. The court of appeals also erred in holding that the statutory burden of proof in 8 U.S.C. 1481(c)—that the party claiming expatriation has the burden of proving it by a preponderance of the evidence—is unconstitutional. Section 1481(c) was enacted to negate this Court's decision in *Nishikawa* v. *Dulles*, 356 U.S. 129 (1958), that the government has the burden of proving expatriation by clear and convincing evidence. The court of appeals misread *Afroyim* as invalidating this statute; *Afroyim* was concerned

with the elements of expatriation rather than the means of proving it. This Court therefore had no need to address the burden of proof question and, in fact, implicitly recognized a congressional power to establish rules of evidence for judicial proceedings where expatriation was at issue.

The burden of proof established by Section 1481(c) should be measured, not by the Citizenship Clause of the Fourteenth Amendment, but by the Due Process Clause of the Fifth Amendment. Thus measured, the statute is constitutional. A citizen's interest in retaining his citizenship is unquestionably of the highest order, but the rigorous standard of proof announced by the court of appeals is unnecessary to accommodate that interest. The inquiry in expatriation cases is not whether the government should take away the individual's citizenship—after *Afroyim*, it is powerless to do so—but only whether the citizen has already done so himself. Thus, the substantive protection inherent in the very concept of expatriation adequately protects the individual's interest in avoiding the erroneous imposition of a significant sanction.

The harshness to the government of the burden of proof required by the court of appeals would be substantially magnified if this Court were to hold, as the court of appeals did, that specific intent is an element of expatriation. It will be exceedingly difficult for the government ever to prove that intent by clear and convincing evidence where the individual testifies to the contrary. By the same token, we acknowledge

that if the Court agrees with us that specific intent is not required, the government's task in expatriation cases would be significantly alleviated regardless of the burden of proof, for the question in such cases would then become simply whether the citizen voluntarily committed an unequivocally expatriating act. This "basically factual" issue is "susceptible of objective proof" (*Addington* v. *Texas*, No. 77-5992 (Apr. 30, 1979), slip op. 13) in a way that subjective intent is not.

3. Finally, the court of appeals erred in striking down the provision of Section 1481(c) that an expatriating act is presumed to have been done voluntarily unless the party resisting expatriation proves the contrary by a preponderance of the evidence. Even assuming *arguendo* that the presumption must be judged by the strict standards this Court has fashioned for presumptions in criminal cases, Section 1481(c) does not violate the Due Process Clause. One may conclude with substantial assurance that it is more likely than not that a person who does an act does it of his own free will. Moreover, it is reasonable to place the burden of proving involuntariness on the individual, because he is in the best position to adduce relevant evidence on the issue. In sum, the evident rationality of the presumption, combined with the individual's opportunity to rebut it by a preponderance of the evidence, satisfies due process.

ARGUMENT

I. INTRODUCTION

A. The Nature of Expatriation

Perhaps because our nation was founded by people who left their native countries to establish a new life, it has long been recognized in this country that "the right of expatriation is a natural and inherent right of all people." Act of July 27, 1868, ch. 249, 15 Stat. 223.[8] But expatriation is not simply a right to be ex-

[8] English common law proclaimed a doctrine of perpetual allegiance, which denied the citizen's right to sever his allegiance to his place of birth. 3 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 20.7(b), at 20-43 (rev. ed. 1979). It was long ago established, however, that this rule was inimical to American jurisprudence. In 1859 Attorney General Black stated the American position (9 Op. Att'y Gen. 356, 359):

> Here, in the United States, the thought of giving [the right of expatriation] up cannot be entertained for a moment. Upon that principle this country was populated. We owe to it our existence as a nation. Ever since our independence we have upheld and maintained it by every form of words and acts. We have constantly promised full and complete protection to all persons who should come here and seek it by renouncing their natural allegiance and transferring their fealty to us. We stand pledged to it in the face of the whole world.

Nine years later, in 1868, Congress sounded its agreement, declaring that "the right of expatriation is a natural and inherent right of all people" (Act of July 27, 1868, ch. 249, 15 Stat. 223), and the courts have consistently adhered to that principle. See, *e.g.*, *Afroyim* v. *Rusk*, 387 U.S. 253, 258-268 (1967). While the 1868 Act "was intended to apply especially to immigrants into the United States[,] * * * [t]he language

ercised; it has been held, in some circumstances, to be a punishment so severe that its imposition required the procedural safeguards of the Fifth and Sixth Amendments. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 167 (1963).[9] Since 1907, Congress has by statute specified the particular acts that result in expatriation, but that statute and its successors reflect the dichotomous nature of expatriation itself: for some citizens, some acts in the statute have indeed been a means of exercising the "inherent right" of expatriation, but for other citizens, statutory acts could lead inadvertently to statelessness. See, *e.g.*, *Trop* v. *Dulles*, 356 U.S. 86 (1958).[10]

is also broad enough to cover, and does cover, the corresponding natural and inherent right of American citizens to expatriate themselves." *Savorgnan* v. *United States*, 338 U.S. 491, 498 n.11 (1950); see also *Perez* v. *Brownell*, 356 U.S. 44, 67 (1958) (Warren, C.J., dissenting).

For a general history of expatriation in the United States, see Duvall, *Expatriation Under United States Law, Perez to Afroyim: The Search for a Philosophy of American Citizenship*, 56 Va. L. Rev. 408 (1970).

[9] Insofar as *Mendoza-Martinez* assumes that expatriation can ever be imposed as a punishment, it has been superseded by *Afroyim* v. *Rusk*, 387 U.S. 253 (1967). See pages 36-38, *infra*.

[10] In the past, the statutory list of expatriating acts has included several that involved no transfer of allegiance to another country. For example, expatriation followed from a dishonorable discharge from military service pursuant to a conviction of wartime desertion. See *Trop* v. *Dulles*, *supra*. Another provision authorized expatriation of a naturalized citizen who lived three years in the country of his former residence or nationality even though such residence may have been insufficient to restore the individual's nationality under

the laws of the foreign country. See *Schneider* v. *Rusk*, 377 U.S. 163 (1964). In such cases, a finding of expatriation would have resulted in statelessness. In each case, the Court found the provision unconstitutional. See note 12, *infra*.

That is not the case today. The acts defined by statute as expatriating (see note 25, *infra*), with one exception, contemplate, as a practical matter, a transfer of allegiance *to* another country. Thus a citizen who is naturalized on his application in another country (8 U.S.C. 1481(a)(1); see also 8 U.S.C. 1481(a)(4)(A)) or who takes an oath of allegiance to another country (8 U.S.C. 1481(a)(2); see also 8 U.S.C. 1481(a)(4)(B)) may be expatriated, but he is not stateless. Similarly, one who voluntarily enlists, without permission of American officials, in the armed forces of another country, will likely be able to take the citizenship of that country. See 8 U.S.C. 1481(a)(3). The only realistic means to acquire statelessness is to make a formal renunciation of American citizenship before an American consular or diplomatic official abroad. 8 U.S.C. 1481(a)(6). The fact that such a renunciation occurred in, say, Canada would not result in Canadian citizenship or even necessarily place the individual in a favored position to receive Canadian citizenship. But the safeguards involved in formal renunciation insure that the individual who does it specifically intends to surrender his American citizenship, and thus his devolution into statelessness is entirely his own choice and is done with full knowledge of the consequences.

The provision allowing expatriation for conviction of treason or conspiracy to overthrow the government by force, or related offenses (see 8 U.S.C. 1481(a)(9)), may conceivably result in statelessness, depending on the circumstances. But given the uniquely hostile nature of treasonous acts, such a result may be tolerable. There is in any event no reason to dwell on that question here.

There appears to be no decision of this Court that has actually resulted in statelessness for any individual. See *Perez* v. *Brownell*, 356 U.S. 44, 80 (1958) (Douglas, J., dissenting). In those cases where a finding of expatriation was upheld, the individual apparently was able to claim the citizenship of another nation. See *Mackenzie* v. *Hare*, 239 U.S. 299, 307

It has been assumed, at least since the early years of this century,[11] that no act can be expatriating unless Congress has designated it as such. It has also been agreed that no act can be expatriating unless it is done voluntarily, that is, knowingly and not under duress. See *Mackenzie* v. *Hare*, 239 U.S. 299, 311-312 (1915); *Savorgnan* v. *United States*, 338 U.S. 491, 502 (1950); *Nishikawa* v. *Dulles*, 356 U.S. 129, 133 (1958). And, until 1967, this Court recognized a congressional power to designate certain acts as expatriating, so long as a "rational nexus" existed between withdrawal of citizenship and a power that Congress otherwise held, such as the power to regulate foreign affairs (see *Perez* v. *Brownell*, 356 U.S. 44, 58 (1958)), and so long as the exercise of that power did not contravene other constitutional restraints, such as the Due Process Clause. See *Kennedy* v. *Mendoza-Martinez*, *supra*, 372 U.S. at 167 (plurality opinion).

(1915) (marriage to a British national); *Savorgnan* v. *United States*, 338 U.S. 491 (1950) (naturalization as an Italian citizen); *Perez* v. *Brownell*, *supra* (citizen born of Mexican parents).

Nothing in our position will, we believe, increase the possibility of statelessness for any person. Certainly appellee will not be stateless, for he is a Mexican citizen regardless of his status under American law (A. 8a).

[11] See Act of Mar. 2, 1907, ch. 2534, 34 Stat. 1228; Nationality Act of 1940, ch. 876, Section 401, 54 Stat. 1168-1169; Immigration and Nationality Act of 1952, 8 U.S.C. 1481.

In 1967, however, this Court decided in *Afroyim* v. *Rusk*, 387 U.S. 253, that the Fourteenth Amendment defined a citizenship that Congress had no power either under that amendment or any other provision of the Constitution to take away.[12] That is,

[12] *Afroyim* was the culmination of a series of cases that began the very day *Perez* was decided, in which the Court held unconstitutional several statutory provisions that deemed certain acts expatriating. In *Trop* v. *Dulles*, *supra*, the Court struck down a provision that expatriated a citizen dishonorably discharged from military service following a conviction for wartime desertion. Four members of the Court concluded that denationalization in such circumstances was a cruel and unusual punishment within the meaning of the Eighth Amendment. See 356 U.S. at 87-104 (plurality opinion). One member of the Court concluded that denationalization was beyond the war powers of Congress. See 356 U.S. at 105-114 (Brennan, J., concurring).

In *Kennedy* v. *Mendoza-Martinez*, *supra*, the Court considered Section 401(j) of the Nationality Act of 1940, as added by the Act of Sept. 27, 1944, ch. 418, 58 Stat. 746, which divested an American of citizenship for leaving the country in time of war to avoid military service. The Court held that the statute violated the Fifth and Sixth Amendments because it imposed the punishment of denationalization without "the procedural safeguards required as incidents of a criminal prosecution" (372 U.S. at 167).

Schneider v. *Rusk*, 377 U.S. 163 (1964) invalidated Section 352 of the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, which provided that a naturalized citizen lost his nationality if he continuously resided for three years in the country of his birth or former nationality. The Court held that this provision was not reasonably related to Congress' power to conduct foreign relations and suggested that the statute's distinction between native-born and naturalized citizens violated the Due Process Clause. 377 U.S. at 168-169. See also *Marks* v. *Esperdy*, 377 U.S. 214 (1964) (expatriation based on service in armed forces of a foreign nation affirmed by an equally divided Court).

a person born or naturalized in this country is a citizen by virtue of the Fourteenth Amendment and thus cannot lose his citizenship unless he "voluntarily relinquishes" it. *Afroyim* v. *Rusk*, *supra*, 387 U.S. at 268.[13] One of the questions necessary to the disposition of this case is whether, in light of *Afroyim*, a citizen must specifically intend to surrender his citizenship or whether "voluntary relinquish[ment]" may result from the voluntary commission of an act inconsistent with a continued allegiance to the United States.

Leaving that question aside for the moment, it is clear that the constitutional validity of the statute at issue here—8 U.S.C. 1481(c)—must be decided in light of *Afroyim*, even though the statute was enacted several years prior to that decision. The court of appeals held that the statute is unconstitutional under *Afroyim*, and we believe the court was wrong. But however that may be, it is important to keep in mind not only that denationalization can be a most undesirable fate—a concern that underpinned *Afroyim*—but also that expatriation has been considered for more than a century (see note 8, *supra*) to be an inherent right of any citizen if he chooses to exercise it—a right that *Afroyim* recognized and preserved.

[13] *Rogers* v. *Bellei*, 401 U.S. 815 (1971), established that *Afroyim* applies only to "Fourteenth-Amendment-first-sentence citizen[s]" (*id.* at 827), that is, those born or naturalized in the United States, and that Congress has power to impose conditions on the citizenship of those who are born abroad of American parents. Because appellee was born in the United States, he is a "Fourteenth-Amendment-first-sentence citizen."

B. Expatriation and Its Proof

As far as the statute itself is concerned, the issue in this case is whether Congress has constitutional authority to prescribe the standard of proof necessary to establish loss of nationality in judicial proceedings and to provide that, in such proceedings, an act of expatriation will be presumed to have been done voluntarily unless the contrary is established by a preponderance of the evidence. The court of appeals held that Congress lacks authority to promulgate those rules of evidence and procedure in expatriation cases.

Section 1481(c) has two parts. The first sentence provides that the party claiming the individual's expatriation (usually, but not always, the government) has the burden of proving by a preponderance of the evidence that "loss of * * * nationality" has occurred. The second sentence provides that an expatriating act, as defined by statute (see 8 U.S.C. 1481(a)), is presumed to have been done voluntarily, but that the party contesting expatriation (usually, but not always, the individual) can rebut the presumption on a showing, by a preponderance of the evidence, that the acts were done involuntarily. Loss of nationality under the statute thus requires proof of (a) the voluntary commission of (b) an act specified by Congress as expatriating.

The court of appeals concluded that "specific intent to renounce U.S. citizenship proved by clear, convincing and unequivocal evidence [is] required before the mere taking of an oath of allegiance could result

in an individual's expatriation" (J.S. App. 12a) and that "the Fourteenth Amendment requires the government to prove by clear, convincing and unequivocal evidence that [the individual] voluntarily relinquished his United States citizenship" (*id.* at 14a). As we read the court's opinion, its holding is twofold: *first*, the government must prove, by clear, convincing and unequivocal evidence, that the allegedly expatriating act was in fact committed; and *second*, the presumption of voluntariness is abrogated and the government must prove by clear, convincing and unequivocal evidence that the expatriating act was done not only voluntarily but with the specific intent to surrender citizenship.

Our position differs from the court of appeals' conclusion in several significant respects. In our view, the government must prove, by a preponderance of the evidence, that the individual in fact committed a specific act designated by statute as expatriating. No such act can result in expatriation unless it was committed voluntarily, but voluntariness, as used in this context, carries its natural and customary meaning, *i.e.*, that the act was done knowingly and not under duress. Voluntariness does not include the specific intent to renounce United States citizenship. In proving voluntariness, the government is entitled to rely on Section 1481(c)'s presumption that a statutorily-designated act of expatriation, if committed, was committed voluntarily. The individual may, as the statute provides, show by a preponderance of the evidence that the act was not in fact the

product of his free will, in which event there can be no judgment of expatriation.

While no act can be expatriating unless it is designated as such by statute, Congress' power of designation is not unlimited. An act can be expatriating under the Constitution only if it is so inherently inconsistent with the continued retention of American citizenship that Congress may accord to it its natural consequences, *i.e.*, loss of nationality. Appellee's declaration of allegiance to a foreign power is such an act, and he committed it voluntarily. Because the government proved those facts as Section 1481(c) allows, the judgment of the court of appeals must be reversed.

We show in Part II that the court of appeals misread *Afroyim* to require, as a condition of expatriation, that the citizen specifically intend to expatriate himself. Analysis of *Afroyim* demonstrates that the Court did not intend to disturb the "traditional legal concept" (Duvall, *supra*, 56 Va. L. Rev. at 409) that there exists a small number of statutorily-defined acts inconsistent with retention of American citizenship and that a citizen who voluntarily and knowingly performs such an act thereby surrenders his citizenship, regardless of whether he may actually have intended to surrender it.[14] In Part III, we show that

[14] In our jurisdictional statement, we did not separately present the question whether expatriation requires a showing of specific intent to surrender citizenship. In our discussion of the constitutionality of Section 1481(c), however, we did indicate (J.S. 14) that appellee's subsequent claim that he had no intent to surrender his citizenship when he applied for a Certificate of Mexican Nationality required a determination whether such intent was necessary to a showing of voluntary relinquishment of American citizenship, and we noted that, if such intent was required, the individual's subsequent denial that he ever had such intent would make it "most difficult" (J.S. 17) ever to prove him wrong, at least under the standard of proof the court of appeals imposed.

the court of appeals was likewise wrong in concluding that *Afroyim*, in effect, held *sub silentio* that Section 1481(c) is unconstitutional under the Fourteenth Amendment. For the reasons we discuss, nothing in *Afroyim* justifies such a conclusion and, in fact, *Afroyim* suggests that Congress has precisely the authority it exercised here.

In Part IV, we demonstrate that the statutory requirement on the party claiming expatriation to prove by a preponderance of the evidence that expatriation has occurred is a constitutional exercise of Congress' power. Finally, in Part V, we show that, in light of the fact that specific intent is not required, Section 1481(c)'s presumption that an expatriating act, once proved, is done voluntarily unless the contrary is shown by a preponderance of the evidence is also a constitutional exercise of congressional power to set rules of evidence for federal courts and does not deny due process of law.

We think it evident that determination of the constitutionality of Section 1481(c) requires this Court to decide whether expatriation requires a specific intent to surrender citizenship. As we have explained above (see pages 22-23, *supra*), the court of appeals plainly held that specific intent is required and that

the government must prove that intent by clear, convincing and unequivocal evidence. We acknowledge that there can be no expatriation without a "voluntary" act. See *Nishikawa* v. *Dulles*, 356 U.S. 129, 133 (1958). The statute presumes that an act done is done "voluntarily." If, as we submit, "voluntariness" in this context means only that the *actus reus* was the product of the individual's free will, then we believe that the presumption is valid because, as we explain in Part V of the text, it is rational to presume that an act done is done voluntarily. On the other hand, if "voluntariness" in this context means an act done with specific intent, then we would not defend the constitutionality of the presumption, for we do not believe it is rational to presume that an act done is done with the design to renounce citizenship. In any event, if specific intent is required, the presumption would be virtually useless, for it would be the rare case in which the government could prove that the act of expatriation was done with specific intent (by whatever standard of proof) yet would be unable to show that it was done voluntarily. Thus, in order to address the question whether the statutory presumption is constitutional, the Court must first, we submit, decide what it is the statute presumes.

If the Court holds, contrary to our argument, that specific intent is required, it need not address at length the constitutionality of the presumption, for, as previously stated, we concede its unconstitutionality. We would still argue, however, that the statutory burden of proof is constitutional and that the government need only prove expatriation—specific intent and all—by a preponderance of the evidence. See Part IV, *infra*.

II. PROOF OF SPECIFIC INTENT TO SURRENDER CITIZENSHIP IS NOT REQUIRED IN EXPATRIATION CASES

As we noted above (see pages 22-23, *supra*), the court of appeals concluded that a specific intent to give up citizenship is an essential element of expatriation. The court reached this conclusion from its reading of *Afroyim* v. *Rusk*, *supra* (see J.S. App. 8a-9a) and, more directly, from its reliance on *United States* v. *Matheson*, 532 F.2d 809, 814 (2d Cir.), cert. denied, 429 U.S. 823 (1976) (see J.S. App. 12a), a case that likewise assumed that *Afroyim* required a showing of specific (or "subjective") intent. We believe that this interpretation of *Afroyim* is erroneous.

To place the matter in its clearest light, it is necessary to examine in some detail this Court's expatriation cases that preceded *Afroyim*. These cases unmistakably recognize that citizenship may be lost, without the specific intent to do so, by the voluntary commission of an expatriating act. Although *Afroyim* narrowed the class of acts that may lead to expatriation, it nonetheless preserved at least the act involved here—the taking of an oath of allegiance to a foreign government—and did not introduce into expatriation proceedings any requirement of proof of specific intent.

A. This Court's Decisions Prior to *Afroyim* Consistently Rejected Any Requirement of Specific Intent

The examination begins with *Mackenzie* v. *Hare*, 239 U.S. 299 (1915), in which a woman who was born in this country and had lived her entire life here was alleged to have lost her citizenship because she married a British national. There was no contention that she at any time actually intended to give up her citizenship, and indeed she claimed that Congress could not impose expatriation on her unless she did intend to transfer her allegiance. *Id.* at 310. The Court rejected this assertion. It held that the United States had an implied power, as an "attribute[] of sovereignty" (*id.* at 311), to divest a citizen of his citizenship and that, while this power "cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen" (*ibid.*), the law providing expatriation during the course of a marriage to a foreign national was not such a law, for "[i]t deals with a condition voluntarily entered into, with notice of the consequences" (*id.* at 311-312).

Thirty-five years later, in *Savorgnan* v. *United States*, 338 U.S. 491 (1950), the Court was faced with the case of a woman born in the United States who became a naturalized citizen of Italy in order to marry a member of the Italian diplomatic corps. In doing so, she signed a written oath, in Italian, renouncing her American citizenship and pledging her allegiance to the King of Italy. She was later denied a United States passport because, under Section 401 (a) and (b) of the Nationality Act of 1940, ch. 876,

54 Stat. 1168-1169, she was deemed expatriated for having been naturalized in another country and for taking an oath of allegiance to that country.[15] In an action to determine her citizenship, Savorgnan testified that she did not understand the Italian language, and the district court found that, although she intended to obtain Italian citizenship, she had "no intention of endangering her American citizenship or of renouncing her allegiance to the United States." *Savorgnan* v. *United States, supra*, 338 U.S. at 495.

Savorgnan's "principal contention" in this Court was that "she did not intend to give up her American citizenship, although she applied for and accepted Italian citizenship, and that her intent should prevail." 338 U.S. at 499. The Court squarely rejected this contention:

> [T]he acts upon which the statutes expressly condition the consent of our Government to the expatriation of its citizens are stated objectively [citing the Nationality Act of 1940]. There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily

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[15] As the Court pointed out in *Savorgnan*, Section 403 of the Nationality Act of 1940, ch. 876, 54 Stat. 1169-1170, deferred expatriation until such time as Savorgnan "[took] up a residence abroad." See 338 U.S. at 493 n.2. Following her naturalization, Savorgnan lived in Italy for four years, and so the Court declined to consider whether the naturalization itself would have expatriated her under the 1907 predecessor of the Nationality Act. See 338 U.S. at 496-497, 504-506.

> done, is conditioned upon the undisclosed intent of the person doing them.

338 U.S. at 499-500.[16]

The Court did not question Savorgnan's assertion that she had never intended to surrender American citizenship and indeed had signed documents written in a language she did not understand. But the Court found that irrelevant: "The petitioner, in the instant case, was a competent adult. She voluntarily and knowingly sought and obtained Italian citizenship. * * * Whatever the legal consequences of those acts may be, she is bound by them." 338 U.S. at 502 (footnote omitted).

With these cases as prologue, we turn to the Court's decision in *Perez* v. *Brownell*, 356 U.S. 44 (1958). Perez was a native-born American who took up residence in Mexico during World War II and voted in a political election there. When he later applied for readmission to the United States, he was excluded on the grounds that he had expatriated himself, and he brought suit for a declaratory judgment that he was a citizen. The Court, in an opinion by Justice Frankfurter, held that Section 401(e) of the Nationality Act of 1940, ch. 876, 54 Stat. 1169, which provided expatriation for voting in a foreign political elec-

[16] Savorgnan did not present the question whether the statute, as thus construed, was constitutional and the Court did not discuss the matter. It did, however, rely on *Mackenzie* v. *Hare*, *supra*, in rejecting Savorgnan's argument that her intent not to surrender American citizenship should be controlling. See 338 U.S. at 501-502.

tion, was constitutional. The Court noted that, in enacting the expatriating provisions of the Nationality Act in issue, Congress "was seeking to effectuate its power to regulate foreign affairs" (356 U.S. at 57), and held that, while "a rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution" (*id.* at 58), such a nexus existed in that case because withdrawal of citizenship was "reasonably calculated to effect the end that is within the power of Congress to achieve, the avoidance of embarrassment in the conduct of our foreign relations attributable to voting by American citizens in foreign political elections" (*id.* at 60).

The Court reaffirmed its prior distinction between voluntariness and intent (356 U.S. at 61):

> Of course, Congress can attach loss of citizenship only as a consequence of conduct engaged in voluntarily. See *Mackenzie* v. *Hare*, 239 U.S. 299, 311-312. But it would be a mockery of this Court's decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so. * * * What both women [in *Mackenzie* and *Savorgnan*] did do voluntarily was to engage in conduct to which Acts of Congress attached the consequence of denationalization irrespective of—and, in those cases, absolutely contrary to—the intentions and desires of the individuals. Those two cases mean nothing—indeed, they are deceptive—if their essential significance is not the rejection of the notion that the power of Congress to terminate citizenship depends on the citizen's assent. It is a distor-

> tion of those cases to explain them away on a theory that a citizen's assent to denationalization may be inferred * * *.

Chief Justice Warren, joined by Justice Black and Justice Douglas, dissented. Because his dissenting opinion was approved in the Court's later decision in *Afroyim*, which overruled *Perez* (see *Afroyim* v. *Rusk*, *supra*, 387 U.S. at 267), it deserves scrutiny to determine just where the *Perez* majority and the dissenters parted company over the scope of congressional power to recognize expatriation of a citizen.

Chief Justice Warren's central premise was that citizenship of the native-born and the naturalized is secured by the Fourteenth Amendment and that Congress has no power under the Constitution to take that citizenship away. *Perez* v. *Brownell*, *supra*, 356 U.S. at 65-66 (Warren, C.J., dissenting). The Chief Justice stated (*id.* at 65; emphasis in original):

> Whatever may be the scope of its powers to regulate the conduct and affairs of all the persons within its jurisdiction, a government *of* the people cannot take away their citizenship simply because one branch of that government can be said to have a conceivably rational basis for wanting to do so.

Chief Justice Warren went on to recognize, however, that "[t]here is no question that citizenship may be voluntarily relinquished" through the "right of voluntary expatriation" (*id.* at 66). In a distinction crucial to the issues here, he stated that "[i]t has long been recognized that citizenship may not only

be voluntarily renounced through exercise of the right of expatriation *but also by other actions in derogation of undivided allegiance to this country*" (356 U.S. at 68 & n.16, citing *Savorgnan* v. *United States*, *supra*, and *Mackenzie* v. *Hare*, *supra*; emphasis added). Although the Constitution precludes the government from divesting citizenship, the Chief Justice noted that it does

> not impair the principle that conduct of a citizen showing a voluntary transfer of allegiance is an abandonment of citizenship. Nearly all sovereignties recognize that acquisition of foreign nationality shows a renunciation of citizenship. Nor is this the only act by which the citizen may show a voluntary abandonment of his citizenship. *Any action by which he manifests allegiance to a foreign state may be so inconsistent with the retention of citizenship as to result in loss of that status.* In recognizing the consequence of such action, the Government is not taking away United States citizenship * * *. Rather, the Government is simply giving formal recognition to the inevitable consequence of the citizen's own voluntary surrender of his citizenship.

Id. at 68-69 (emphasis added; footnotes omitted).

Chief Justice Warren went on to discuss at some length the Court's decisions in *Mackenzie* and *Savorgnan* and concluded that, while those cases did not "sanction a power to divest citizenship," they did "acknowledge[] that United States citizenship can be abandoned * * * by conduct showing a voluntary trans-

fer of allegiance to another country." 356 U.S. at 73. Thus, in his view, the test to be applied to a statute that deems a particular act expatriating is "whether the conduct it describes invariably involves a dilution of undivided allegiance sufficient to show a voluntary abandonment of citizenship." *Id.* at 75. The Chief Justice was even willing to recognize that in some circumstances voting in a foreign election—the very act that expatriated Perez—would "[d]oubtless * * * have this effect." *Ibid.* But the "fatal defect in the statute before us is that its application is not limited to those situations that may rationally be said to constitute an abandonment of citizenship" (*id.* at 76), because voting in a foreign election "may be a most equivocal act, giving rise to no implication that allegiance has been compromised." *Id.* at 77. In short, said Chief Justice Warren, the right to citizenship is "immune from the exercise of government powers" but, at the same time, "[t]he citizen may elect to renounce his citizenship, and under some circumstances he may be found to have abandoned his status by voluntarily performing acts that compromise his undivided allegiance to his country" (*id.* at 78).

Justice Douglas (who, with Justice Black, joined Chief Justice Warren's dissent) also wrote a dissenting opinion. Joined by Justice Black, he agreed that a citizen remains a citizen unless he "voluntarily relinquishes" that status—the same phrase that the Chief Justice had used. 356 U.S. at 84 (Douglas, J., dissenting); see *id.* at 66 (Warren, C.J., dissenting). Justice Douglas acknowledged that citizenship

"may be waived by the citizen" if the waiver is "*first* a voluntary act and *second* an act consistent with a surrender of the right granted" (356 U.S. at 83; emphasis in original). "While Congress can prescribe conditions for voluntary expatriation," he continued, "Congress cannot turn white to black and make any act an act of expatriation." *Id.* at 84.[17]

This summary clearly indicates that, whatever the sharp division over the question whether Congress could expatriate a citizen merely for voting in a foreign election, the dissenting Justices in *Perez*—indeed, the entire Court—recognized and endorsed at least the principle that a citizen could expatriate himself in one of two ways: explicitly, or by voluntarily engaging in an act that demonstrated such a compromise of allegiance that it "may rationally be said to constitute an abandonment of citizenship." *Id.* at 76 (Warren, C.J., dissenting). Neither the Chief Justice's opinion nor that of Justice Douglas contains any suggestion that a specific intent to renounce citizenship is necessary if the expatriating act falls into the latter category. Indeed, Chief Justice Warren's detailed discussion distinguishing *Perez* from *Mackenzie*—a case in which, as Justice Frankfurter pointed out in the opinion for the Court (356 U.S. at 61-62), the citizen's intent *not* to relinquish

[17] Justice Whittaker also dissented because, like Chief Justice Warren, he could not conclude that voting in a foreign election "can * * * be reasonably said to constitute an abandonment or any division or dilution of allegiance to the United States." *Perez* v. *Brownell, supra,* 356 U.S. at 85 (Whittaker, J., dissenting).

her citizenship was well established but irrelevant—demonstrates that he and his dissenting colleagues felt that no such requirement was necessary. And the Chief Justice left no doubt that a renunciation of American citizenship and naturalization under the laws of a foreign state—an act similar to appellee's oath of allegiance to Mexico—constitutes "conduct showing a voluntary transfer of allegiance to another country" (356 U.S. at 73).

B. *Afroyim* Did Not Introduce a Requirement of Specific Intent

This, then, leads to consideration of *Afroyim* v. *Rusk*, 387 U.S. 253 (1967), the decision that overruled *Perez* and that the court of appeals believed compelled the conclusion that Section 1481(c) is unconstitutional. Afroyim, a naturalized American citizen, lived in Israel for ten years and, while there, voted in a political election. He was denied an American passport to return to the United States because of that vote, on authority of Section 401(e) of the Nationality Act of 1940, ch. 876, 54 Stat. 1169, the same statute that had been upheld in *Perez*.[18] The Court, in an opinion by Justice Black, phrased the issue as "whether Congress can consistently with the Fourteenth Amendment enact a law stripping an American of his citizenship which he has never voluntarily renounced or given up." 387 U.S. at 256.

[18] Section 401(e) provided that an American citizen "shall lose his nationality by * * * [v]oting in a political election in a foreign state * * *." See 387 U.S. at 254 n.1. This section was repealed in 1978. See note 25, *infra*.

The Court began by "reject[ing] the idea expressed in *Perez* that, aside from the Fourteenth Amendment, Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent" (387 U.S. at 257). Although it recognized that the question may have been open prior to passage of the Fourteenth Amendment (*id.* at 261), that amendment, said the Court, removed all doubt whether Congress has "the power to deprive a person against his will of citizenship once obtained" (*id.* at 262). The Fourteenth Amendment "can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it." *Ibid.* The purpose of that amendment—to make secure the citizenship granted to Negroes by the Civil Rights Act—"would be frustrated by holding that the Government can rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power" (*id.* at 263).

The Court noted what appeared to be the belief of Congress, in rejecting a bill in 1868 that would have provided a means of implementing a citizen's decision to expatriate himself, that "the only * * * way * * * citizenship * * * could be lost was by the voluntary renunciation or abandonment by the citizen himself." 387 U.S. at 266. And it found support in previous cases for the proposition that Congress had no power to restrict, abridge or take away citizenship. *Id.* at 266-267. Accordingly, said the Court, "[b]ecause the Fourteenth Amendment prevents Congress from doing any of these things, we agree with [Chief Jus-

tice Warren's] dissent in the *Perez* case that the Government is without power to rob a citizen of his citizenship under § 401(e)." 387 U.S. at 267 (footnote omitted). It concluded that a citizen has "a constitutional right to remain a citizen * * * unless he voluntarily relinquishes that citizenship." *Id.* at 268.

Justice Harlan, joined by Justice Clark, Justice Stewart, and Justice White, dissented. He adhered to the reasoning of *Perez* and vigorously took issue with the majority's reading of the congressional debates surrounding adoption of the Fourteenth Amendment (387 U.S. at 268-293). Justice Harlan also pointed out a "fundamental ambiguity" in the Court's opinion: although Chief Justice Warren's dissent in *Perez*, the reasoning of which the Court ostensibly adopted, spoke clearly of acts in derogation of undivided allegiance that could result in expatriation, the majority opinion in *Afroyim* asserted only that Congress was without power to expatriate a citizen "without his assent." Justice Harlan observed that "voluntariness * * * has been employed to describe both a specific intent to renounce citizenship, and the uncoerced commission of an act conclusively deemed by law to be a relinquishment of citizenship. Until the Court indicates with greater precision what it means by 'assent,' today's opinion will surely cause still greater confusion in this area of the law." 387 U.S. at 269 n.1.

Only if read in isolation, then, can the majority opinion in *Afroyim* lead one to conclude that the Court held that specific intent to surrender citizenship is a

requisite to any judgment of expatriation. While the phrases "without his assent" (387 U.S. at 257) or "against his will" (*id.* at 262) might imply that the Court was assuming a requirement of specific intent, any interpretation of *Afroyim* that emphasizes the word "assent" (or "will") to find such a requirement ignores the larger import of that decision.

Certainly *Afroyim* does not, beyond the occasional use of those words (which Justice Harlan quite accurately characterized as ambiguous), purport to hold that specific intent is necessary to surrender citizenship. It discusses Afroyim's intent not at all. Nor does the Court's opinion suggest any disagreement with Chief Justice Warren's repeated assertion in *Perez* that there is a certain category of acts whose voluntary commission demonstrates an abandonment of citizenship that Congress may properly recognize as expatriating. Indeed, it is far more reasonable to infer that the Court implicitly endorsed that view when it stated that it "agree[d] with [Chief Justice Warren's] dissent in the *Perez* case" (387 U.S. at 267). And we do not think it coincidence that the Court in *Afroyim* expressed its holding by stating that citizenship continues until the citizen "voluntarily relinquishes" it (*id.* at 268)—the very same words that the Chief Justice and Justice Douglas had used in their *Perez* dissents to refer not only to an explicit renunciation of citizenship but also to an abandonment through the knowing and uncoerced commission of an unequivocal act of expatriation. See *Perez* v. *Brownell*, *supra*, 356 U.S. at 66 (Warren, C.J., dissenting), 84 (Doug-

las, J., dissenting). Justice Black, the author of the Court's opinion in *Afroyim*, joined both of these dissents, and Chief Justice Warren and Justice Douglas in turn joined Justice Black's opinion for the Court in *Afroyim*.

Finally, *Afroyim* did not even mention, let alone distinguish or overrule, either *Mackenzie* v. *Hare*, *supra*, or *Savorgnan* v. *United States*, *supra*, both of which had held that even an intent *not* to relinquish citizenship is irrelevant so long as the expatriating act is voluntarily done. If one reads *Afroyim* as requiring a specific intent to relinquish citizenship, surely *Mackenzie* and *Savorgnan* are no longer viable; but if that is the case, the Court's failure to mention them is inexplicable, especially considering the prominence those cases received in Chief Justice Warren's dissent in *Perez*.[19]

In short, we think it clear that, while *Afroyim* established that a citizen can lose his citizenship

[19] The actual expatriating act in *Mackenzie*—marriage to a foreign national—is, like voting in a foreign election, so equivocal that, even if voluntarily performed, it cannot rationally be deemed expatriating. Indeed, Congress reached that conclusion 50 years ago and eliminated marriage from the list of expatriating acts. See *Perez* v. *Brownell*, *supra*, 356 U.S. at 72 n.76 (Warren, C.J., dissenting); *Rocha* v. *INS*, 351 F.2d 523 (1st Cir. 1965), withdrawn on reconsideration, 450 F.2d 946 (1971). But that repeal does not disturb *Mackenzie's* holding that intent is not determinative. In any event, the expatriating act in *Savorgnan*—an oath of allegiance to a foreign nation following naturalization—is in no sense comparable to marriage to a foreigner or voting in a foreign election. Appellee's act here is, of course, much like Savorgnan's and not at all like Mackenzie's.

only if he "voluntarily relinquishes" it, that decision did not go so far as to hold that relinquishment could be "voluntary" only if the citizen specifically intended those consequences.[20] We read *Afroyim*, rather, as recognizing the concept, never disputed by any member of this Court, that there exists a certain category of acts which, if identified by Congress and if done knowingly and of the actor's free will, expatriate the actor regardless of his subjective intent.[21] *Afroyim* held only that voting in a

[20] Indeed, the concept of "voluntariness" in criminal law has never included the notion of specific intent, or any intent at all. Voluntariness means only that the *actus reus* was the product of the actor's free will. See, *e.g.*, *Model Penal Code* § 2.01 (Tent. Draft No. 4, 1955); 1 W. Burdick, *Law of Crime* §§ 198-199 (1946). Defenses such as involuntariness relieve a person of responsibility for his acts as a matter of social policy, not because they negate the mental element required. See *e.g.*, W. LaFave & A. Scott, *Handbook on Criminal Law* § 8, at 46-47 (1972).

[21] This Court has discussed *Afroyim* in detail only once. In *Rogers* v. *Bellei*, 401 U.S. 815 (1971), the Court held that Congress could validly provide that a person born abroad of one American parent was a citizen only if he lived five years in this country between the ages of 14 and 28. The Court explained that this "deprival of citizenship, once bestowed" did not offend *Afroyim* because a person born abroad was not a citizen protected by the Fourteenth Amendment (*id.* at 817) and thus his citizenship was "necessarily left to proper congressional action" (*id.* at 830). The Court's opinion sheds no light on the aspect of *Afroyim* that concerns us here.

In *Ambach* v. *Norwick*, No. 76-808 (Apr. 17, 1979), the Court pointed out that the government has greater latitude in limiting the participation of noncitizens in government than it has in limiting the participation of citizens, and it noted in that regard: "In *Afroyim* v. *Rusk*, 387 U.S. 253

foreign political election, without more, is not among that category of acts.

We recognize that the court of appeals and the Second Circuit, in a case on which the court of appeals relied, have read *Afroyim* as imposing a requirement of specific intent before a finding of expatriation may be made. In the Second Circuit case, *United States* v. *Matheson*, 532 F.2d 809, cert. denied, 429 U.S. 823 (1976), an American-born woman married a Mexican national in 1944 and thus, under Mexican law, became a citizen of that country. She made a declaration of allegiance to Mexico in that year, 25 years before her death.[22] That declaration included an agreement "not to invoke with respect to the Government of the Republic [of Mexico] any right inherent in my nationality of origin." 532 F.2d at 816. Her executor later claimed that such an act had been expatriating and thus that the estate was not subject to American taxation. The

(1967), the Court held that the Constitution forbade Congress from depriving a person of his citizenship against his will for any reason." Slip op. 7 n.5. We do not read this sentence as imposing a requirement of specific intent, any more than *Afroyim's* use of similar language did.

[22] In 1949, five years after the *Matheson* decedent made her declaration, Mexico amended its nationality law to provide that a non-Mexican who married a Mexican citizen would not acquire Mexican nationality unless he specifically renounced foreign allegiance. The declaration of dual nationality that the *Matheson* decedent made was thus discarded and replaced by the unequivocal oath of allegiance (and renunciation of former nationality) that appellee executed. *United States* v. *Matheson*, *supra*, 532 F.2d at 817. See A. 5a.

United States argued, on the other hand, that the declaration was not truly an oath of allegiance to Mexico but was only a formal statement of the nationality she had accepted by her marriage. The court of appeals agreed, noting that the declaration was "merely a subscription to a basic principle of international law governing dual nationality: that a national of one country (e.g., United States) may not look to it for protection while she is in another country (e.g., Mexico), of which she is also a national." 532 F.2d at 816. The decedent's "limited surrender did not preclude her from claiming rights as a United States citizen *outside* of Mexico" (*ibid.*; emphasis in original), and thus unlike the unequivocal oath of allegiance to Italy in *Savorgnan* v. *United States*, *supra*, the declaration was "not expatriating in nature." *Id.* at 818.

The Second Circuit held that, under *Afroyim*, "there must be proof of a specific intent to relinquish United States citizenship before an act of foreign naturalization or oath of loyalty to another sovereign can result in the expatriation of an American citizen." 532 F.2d at 814. The court concluded that, considering among other things the limited acquiescence to Mexican authority in the decedent's 1944 declaration of dual nationality, she "never formed the requisite intent to expatriate * * *." 532 F.2d at 817.[23]

[23] The court of appeals also held that, regardless of whether the decedent had the requisite intent to abandon citizenship in 1944, her estate was estopped from asserting that loss in light

On the other hand, some federal courts have refused to read *Afroyim* as requiring specific intent, or at least have recognized that the matter is a

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of decedent's "numerous representations of loyalty" to the United States subsequent to 1944, which had secured for her a number of advantages, including the issuance of United States passports on 15 different occasions and substantial tax benefits (532 F.2d at 819). The decedent and her estate, said the court, "cannot simply 'blow hot and cold' in their dealings with the government * * *" (*id.* at 820; citation omitted). In addition, the court held that the estate was barred by laches from asserting expatriation, because the decedent had never raised the question during her lifetime and the government was prejudiced by its inability to call her as a witness when the estate finally raised it after her death (*id.* at 820-821).

The estate filed a petition for a writ of certiorari, arguing that *Afroyim* did not overrule *Savorgnan* and that the court of appeals had erred in reading *Afroyim* to require a showing of specific intent to renounce citizenship. No. 75-1651 Pet. 12. The United States opposed, filing a brief that may fairly be read as urging that *Afroyim* did indeed require a showing of specific intent and that the court of appeals had correctly found that the decedent had no such intent. Br. in Opp. 6-8. However, we also urged that "[e]ven if decedent's application for a certificate of Mexican nationality was expatriating," the estate was barred both by estoppel and by laches from asserting that fact to avoid payment of United States taxes. *Id.* at 9, 10 & n.6.

Our position in the present case is not inconsistent with the result we sought in *Matheson* for, as noted, the citizen there did not voluntarily relinquish her citizenship. Our position here, however, is contrary to the statements we made on specific intent in our brief in opposition in *Matheson*. Our present position has been determined after a thorough reexamination of the issues involved in determining whether expatriation has taken place and comes only after discussions with the Department of State, the Immigration and Naturalization Service, the Internal Revenue Service and various divisions of the Department of Justice—an opportunity we did not pursue in preparing our brief in opposition in *Matheson*.

good deal less clear than the court of appeals assumed here. *Peter* v. *Secretary of State*, 347 F. Supp. 1035 (D.D.C. 1972) (three-judge court), for example, clearly recognizes that specific intent is not a requisite of expatriation.[24] Peter was a naturalized American citizen who married a Hungarian national in 1942 (thereby acquiring Hungarian citizenship as well), moved to Hungary in 1949, and was employed by the government of that country until 1965. In 1970, while still a resident of Hungary, she applied at the United States Embassy for registration as an American citizen but was informed that she had expatriated herself under 8 U.S.C. 1481(a)(4) by having accepted employment from a foreign government while a national thereof. The district court held that Peter had not lost her citizenship, finding that the "facts do not support * * * an inference of an intent to forfeit her American citizenship, or voluntarily to renounce it. Nor were these acts shown to be 'so inconsistent with the retention of [American] citizenship as to result in the loss of that status.'" 347 F. Supp. at 1038, quoting from *Perez* v. *Brownell*, *supra*, 356 U.S. at 68 (Warren, C.J., dissenting). The decision therefore supports our view that citizenship may be lost either by an explicit and intentional renunciation or by the voluntary commission of an act necessarily inconsistent

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[24] The court of appeals relied on *Peter* for the proposition that the government bears the burden of proving expatriation by "clear, convincing and unequivocal evidence" (J.S. App. 11a-12a; see 347 F. Supp. at 1038). We discuss that issue at pages 68-76, *infra*.

with continued allegiance to this country. In holding that expatriation had not occurred, the *Peter* court simply found that neither factor was present.

King v. *Rogers*, 463 F.2d 1188 (9th Cir. 1972), "assume[d], without deciding, that specific subjective intent to renounce United States citizenship is required for expatriation" (*id.* at 1189; footnote omitted), but went on to conclude that such intent could be proved by "acts inconsistent with United States citizenship" or by " 'affirmative voluntary act[s] clearly manifesting a decision to accept [foreign] nationality * * *' " (*ibid.*). The court thus appeared to believe that whatever the need for a showing of specific intent, the requirement could be satisfied by acts that implied the existence of that intent. We believe that the concept of inferred or presumed intent is an unnecessary and confusing one in this context, as well as a concept that was vigorously disavowed by the Court in *Perez* (see 356 U.S. at 61-62) and conspicuously ignored by the dissenters in that case. In any event, it adds nothing of substance to the analysis of the issue, for it is, as the Ninth Circuit appeared to acknowledge, simply a label that can be attached to the mental state accompanying the voluntary commission of acts necessarily inconsistent with continued citizenship.

Finally, the Fifth Circuit in *Jolley* v. *INS*, 441 F.2d 1245, cert. denied, 404 U.S. 946 (1971), expressed some doubt as to exactly what acts amounted to "voluntary reliquish[ment]" of citizenship—a question that it too found unnecessary to decide on

the facts of that case—but it mentioned the possibility that there might be some acts "short of formal renunciation [that] can impliedly result in assent to loss of nationality." *Id.* at 1249 n.9. While this is apparently nothing more than the notion of "presumed intent" adopted in *King* v. *Rogers*, *supra*, it does at least recognize, as the Ninth Circuit did, that expatriation can follow from the voluntary commission of certain acts, regardless of the actor's actual subjective intent not to expatriate himself.

C. Specific Intent Should Not Be Required In Expatriation Cases

As we have shown in Parts IIA and IIB, this Court has never held that specific intent to surrender citizenship is a requisite of expatriation. For the reasons we discuss in this section, the Court should not do so in this case. It should explicitly recognize, as Chief Justice Warren did in his dissenting opinion in *Perez* v. *Brownell*, *supra*, 356 U.S. at 68 (footnote omitted), "the principle that conduct of a citizen showing a voluntary transfer of allegiance is an abandonment of citizenship" and thus that "[a]ny action [defined by statute] by which [the citizen] manifests allegiance to a foreign state may be so inconsistent with the retention of citizenship as to result in loss of that status." If the conduct the statute describes manifests "a dilution of undivided allegiance sufficient to show a voluntary abandonment of citizenship" (*id.* at 75), then it "give[s] rise to [an] implication that allegiance has been compromised" (*id.* at 77), and "the Government [may give] formal

recognition to the inevitable consequence of the citizen's own voluntary surrender of his citizenship" (*id.* at 69).

This Court has consistently and in many different contexts emphasized the importance of citizenship and the high value to be placed on it. See, *e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886); *Schneiderman* v. *United States*, 320 U.S. 118, 120 (1943). We need not dwell on the proposition that a citizen has the highest interest in retaining his citizenship, for the issue here is not whether the government has a countervailing interest sufficient to take citizenship away. *Afroyim* establishes that the government has no power to do so. But it is equally evident, we submit, that the government has a legitimate and substantial interest in being able to identify and announce those acts that, if voluntarily performed, will be taken as manifesting a transfer of allegiance sufficient to allow expatriation to follow, and to recognize and deal with those acts when they occur.[25]

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[25] The acts now designated by statute as expatriating are:

(1) obtaining naturalization in a foreign state as a result of one's own application (or, with certain conditions not necessary to set forth here, as a result of the application of a parent or guardian), 8 U.S.C. 1481(a)(1);

(2) "taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof," 8 U.S.C. 1481(a)(2);

"Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other." *Luria* v. *United States*, 231 U.S. 9, 22 (1913). Hence, "[a]n American citizen owes allegiance to the United States wherever he may reside" (*Kawakita* v. *United States*, 343 U.S. 717, 736 (1952)), and is obliged to contribute his fair share to the orderly governance of the nation by the payment of taxes, military service, jury duty and other just demands. On the other hand, a

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(3) unauthorized military service in the armed forces of a foreign state, 8 U.S.C. 1481(a)(3);

(4) taking an office in or serving in the employ of, a foreign government while a national thereof or for which an oath of allegiance is required, 8 U.S.C. 1481(a)(4);

(5) "making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state," 8 U.S.C. 1481(a)(6);

(6) under certain conditions, making a formal written renunciation of nationality while in the United States, 8 U.S.C. 1481(a)(7);

(7) conviction of treason, or of attempting by force to overthrow the government, or of specified related offenses (including conspiracy to commit such offenses), 8 U.S.C. 1481(a)(9).

See Act of Oct. 10, 1978, Pub. L. No. 95-432, 92 Stat. 1046, which repealed former 8 U.S.C. 1481(a)(5) (voting in a foreign election) and 1481(a)(8) (desertion).

Here, of course, appellee does not dispute that the taking of an oath of allegiance to a foreign state (8 U.S.C. 1481(a)(2)), is an act that Congress constitutionally may designate as expatriating.

citizen has civil rights secured by the Constitution, including the right to full and effective participation in the political process (see *Sugarman* v. *Dougall*, 413 U.S. 634, 647-649 (1973); *Foley* v. *Connelie*, 435 U.S. 291, 295-297 (1978)), and he may call upon the protection of the United States, both at home and abroad.

The government thus has an undeniable interest in knowing who is a citizen and who is not, who is eligible for the benefits of citizenship and whom it may enlist in time of need. As the Court recently remarked, "[t]he distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State." *Ambach* v. *Norwick*, No. 76-808 (Apr. 17, 1979), slip op. 6. In sum, "'[i]t is a legitimate concern of Congress that those who bear American citizenship and receive its benefits have some nexus to the United States'" and do not entertain divided or diluted national loyalties in derogation of the "unequivocal legal bond" of citizenship. *Rogers* v. *Bellei*, 401 U.S. 815, 832 (1971). The government is therefore entitled to know with certainty whether the commission of certain acts has the effect of expatriation.

This interest is not one that is in conflict with the interest of the individual. A citizen should not be made to guess at what acts will endanger his citizenship. If a citizen wishes to marry a foreign national, or study abroad, or take a job with a foreign government, or naturalize himself under the laws of a

foreign country, or do any number of other acts that to a greater or lesser extent may bring him into official contact with the government of another nation, he no less than the United States has a strong interest in being able to ascertain the consequences of that act on his citizenship. If he desires to retain his American citizenship, he should know with assurance that there are some things that he is free to do, *e.g.*, study abroad, and other things that he is not, *e.g.*, naturalizing himself under the laws of another country. At the same time, if a citizen wishes to expatriate himself, for whatever reasons, he should be able to do so with equal assurance of its validity, so that the United States may not thereafter assert claims on his loyalty (*e.g.*, by attempting to induct him into military service) or otherwise take action to his detriment (*e.g.*, by attaching property in this country in satisfaction of tax obligations premised on his continuing citizenship).

To require that citizenship can be relinquished only on proof of the citizen's specific intent, regardless of the fact that his acts demonstrated a transfer of allegiance at the time they were committed, would impair the government's ability to determine citizenship, and would not advance any legitimate countervailing interest. It would in effect recognize a "fair-weather citizenship" (*Kawakita* v. *United States*, *supra*, 343 U.S. at 736) by allowing a citizen to commit an apparently expatriating act when that is to his advantage and then later to claim that he never intended to sever his ties with the United States

when it became to his advantage to claim some benefit of citizenship. A requirement of specific intent would allow the individual to transfer his allegiance while at the same time retaining the power to reactivate his citizenship upon a mere showing—perhaps even a mere claim [26]—that, in his heart, he did not intend to give up his nationality, no matter what his acts may have appeared to show at the time. This is a bridge that can be crossed in only one direction, for if the United States attempts to exact some duty of citizenship (such as military service or payment of taxes) the individual can effectively burn the bridge by asserting that he intended to do exactly what his acts manifested—an assertion that would be virtually impossible to dispute, given the fact that an expatriating act is, by definition, one that demonstrates a transfer of allegiance to another country.

A specific intent requirement would provide a haven not only for those who actually retained a desire not to surrender their citizenship but also for those who were devious from the beginning, plotting an ostensible expatriation for some temporary advantage in full knowledge that the government had no effective way of enforcing it once the individual's need for the advantage had passed. We believe neither group is deserving of protection. As to the former group, "there would seem to be a point at which the allegiance of an individual has so clearly shifted that his desire, for his own motives, to retain formal American citizenship should become irrelevant * * *, [p]articularly where citizenship has been obtained in a second country as a result of affirmative action by the individual." Note, *The Supreme Court, 1966 Term*, 81 Harv. L. Rev. 110, 138 (1967). As to the latter group, little need be said: if the interests of those who actually wish to retain formal citizenship notwithstanding a transfer of allegiance to another country are irrelevant, *a fortiori* there is no reason to protect those who intentionally create a situation where they can later claim a desire they never had.

[26] See Part IV, *infra*.

The predicament is well illustrated in this case. We simply do not know (and probably will never know) whether, as he claims, appellee had a "desire, for his own motives, to retain formal American citizenship" (Note, *supra*, 81 Harv. L. Rev. at 138) or whether he instead was pursuing a course designed to evade the obligations of military service. Both courts below recognized that appellee's desire to avoid the draft could reasonably be inferred from the evidence. See J.S. App. 5a n.5, 26a. However that may be, what is clear is that when appellee applied for a Certificate of Mexican Nationality he expressly renounced his citizenship of, and his loyalty to, the United States and swore obedience to the authority of Mexico (A. 5a). He also received, read and understood the certificate itself when it was issued to him; that certificate stated that appellee had "sworn adherence, obedience, and submission to the

laws and authorities of the United Mexican States" and "ha[d] renounced all rights inherent to any other nationality, as well as all submission, obedience, and loyalty to any foreign government" (A. 8a; J.S. App. 21a). Nine months after he received this certificate, he submitted a statement in connection with his request for a determination of his nationality status, reiterating that his oath of allegiance to Mexico was freely and voluntarily given and indeed, was given "with the intention of relinquishing my United States citizenship" (A. 30a).

Only after receiving this certificate from the State Department did appellee institute the litigation now before the Court. In this litigation, appellee has claimed that he lacked the requisite specific intent to surrender citizenship (see A. 16a), despite what we believe are his unequivocally contrary acts and statements at the time he swore allegiance to Mexico. Even setting aside for the moment the fact that the court of appeals has required the United States to prove such intent by clear, convincing and unequivocal evidence, we submit that such a subjective state of mind has no place in an expatriation determination, given the opportunities for fraud, the compelling governmental interest in knowing conclusively who is, and who is not, a citizen of the United States, and the protection already afforded to the individual by the requirement that the expatriating act be one designated by statute, voluntarily done, and inherently demonstrative of a transfer of allegiance.

D. Appellee's Oath of Allegiance to Mexico Was an Expatriating Act

Appellee's formal declaration of allegiance to Mexico fits all of the above qualifications as an expatriating act. It is designated by statute. 8 U.S.C. 1481 (a)(2). It was voluntarily done, as appellee freely admits. See A. 12a, 13a, 27a, 30a. And an oath of "adherence, obedience, and submission" to a foreign country unquestionably demonstrates such a transfer of allegiance that expatriation is but a formal recognition of its natural consequences. See *Perez* v. *Brownell*, *supra*, 356 U.S. at 68-69 (Warren, C.J., dissenting).

Moreover, the Department of State and the lower courts were entitled to rely on the fact that the oath of allegiance was executed in connection with appellee's successful application for a certificate of Mexican nationality.[27] The State Department did not proceed under the statutory provision recognizing expatriation for naturalization on application (see 8 U.S.C. 1481(a)(1); J.S. App. 31a), probably because appellee was a Mexican national at birth (see page 4, *supra*). Nor did it proceed under the provision

[27] Appellee later asserted that he did not intend by that application to relinquish citizenship or to abandon his allegiance to the United States (A. 13a, 19a). The court of appeals, focusing on these statements and deemphasizing the squarely contradictory ones contained in the same application (J.S. App. 6a), implied that this was not clear and convincing evidence of appellee's intent to surrender citizenship. This disposition furnishes clear judicial guidance to any citizen on how to fashion what is, in effect, a revocable declaration of expatriation.

recognizing expatriation through renunciation (see 8 U.S.C. 1481(a)(6) and (7), note 25, *supra*), because that section requires the renunciation to be before a United States officer. We therefore do not suggest either the naturalization or the renunciation portions of the statute as alternative grounds to sustain the State Department's issuance of the certificate. See *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). But certainly there is nothing to prohibit the State Department from considering the circumstances in which the declaration of allegiance was made, including, as here, the fact that it was offered in connection with a formal demand for recognition of appellee's Mexican nationality and was accompanied by a renunciation of United States citizenship.

It may be that, in other cases, an oath that is more vague or more limited might not be an expatriating act. See, *e.g.*, *United States* v. *Matheson*, *supra*, 532 F.2d at 816; *Baker* v. *Rusk*, 296 F. Supp. 1244 (C.D. Cal. 1969). Such cases must be decided as they arise, but on these facts there can be no doubt that the oath appellee voluntarily took was a transfer of allegiance that Congress was entitled to recognize as expatriating, without concerning itself with appellee's subjective and well-concealed intent.[28]

[28] In the wake of *Afroyim*, the Attorney General published a statement of interpretation (42 Op. Att'y Gen. 397 (1969)) designed to guide the State Department and INS in the administrative determination of expatriation questions. Noting the "sweeping language" of *Afroyim* (*id.* at 397), and cautioning that "the ultimate determination of the effect of

Afroyim is a matter for the courts" (42 Op. Att'y Gen. at 398), the Attorney General stated (*id.* at 400):

> For administrative purposes, and until the courts have clarified the scope of *Afroyim*, I have concluded that it is the duty of executive officials to apply the act on the following basis. "Voluntary relinquishment" of citizenship * * * can * * * be manifested by * * * actions declared expatriative under [8 U.S.C. 1481(a)] if such actions are in derogation of allegiance to this country. Yet even in those cases, *Afroyim* leaves it open to the individual to raise the issue of intent.
>
> Once the issue of intent is raised [18 U.S.C. 1481(c)] makes it clear that the burden of proof is on the party asserting that expatriation has occurred.

Certain acts (such as enlisting in any army hostile to the United States in time of war) would be "highly persuasive evidence * * * of an intent to abandon United States citizenship" (*id.* at 401), but the Attorney General concluded that "[i]n each case the administrative authorities must make a judgment, based on all the evidence, whether the individual comes within the terms of an expatriation provision and has in fact voluntarily relinquished his citizenship" (*ibid.*).

Guided by this statement, both the State Department and the Immigration and Naturalization Service have adopted administrative guidelines that attempt to ascertain the individual's intent by taking into consideration the nature of the expatriating act and the individual's statements and actions made in connection with that act. See 8 Foreign Affairs Manual § 224.20; Interpretations of the INS § 349.1 (d)(2) *et seq.* (We are lodging copies of these materials with the Clerk of the Court.)

As the Attorney General's statement and the operating procedures of the State Department and INS demonstrate, *Afroyim's* teaching on the question of specific intent has been far from clear and (as Justice Harlan predicted in dissent (see page 38, *supra*)), has caused substantial uncertainty at the operating level. Both the State Department and INS have resolved the ambiguity, for the time being, in favor of requiring a showing of specific intent.

III. *AFROYIM* DID NOT HOLD SECTION 1481(c) UNCONSTITUTIONAL

As we showed in Part II, *supra*, there is not, nor should there be, a requirement that a citizen must specifically intend to renounce his American citizenship before that citizenship can validly be lost. It is sufficient that the citizen voluntarily and knowingly perform an act, designated by Congress, which is so unequivocal that Congress may provide formal recognition, *i.e.*, loss of nationality, to the act's natural consequences. We now turn to the question of how such matters may be proved—the question that Section 1481(c) addresses. In this Part, we show that, contrary to the court of appeals' conclusion, the presumption of voluntariness and the burden of proof set forth in Section 1481(c) are not invalid under *Afroyim*, because *Afroyim* did not address those issues. In Parts IV and V, we show that Section 1481(c) must be measured, not against the Fourteenth Amendment Citizenship Clause, but against the Due Process Clause of the Fifth Amendment, and that it is wholly consistent with that Clause.

A. Section 1481(c) Was Enacted to Overrule This Court's Holding That the Voluntariness of an Expatriating Act Must Be Proven by Clear and Convincing Evidence

Like the inquiry into the necessity of proving specific intent, the inquiry into whether Section 1481(c) is constitutional requires some historical perspective. The Court first addressed the issue in detail in *Nishikawa* v. *Dulles*, 356 U.S. 129 (1958). Nishi-

kawa was an American-born citizen who went to Japan in 1939, ostensibly to study, and was drafted into the Japanese army in 1941. After the war, he applied for an American passport in Japan but was informed that he was expatriated under Section 401(c) of the Nationality Act of 1940, ch. 876, 54 Stat. 1169, for having served in the armed forces of a foreign nation. Nishikawa brought suit, although he did not challenge the constitutionality of Section 401(c). He contended only that his induction had been involuntary because he "had heard rumors about the brutality of the Japanese secret police which made him afraid to make any protest" (356 U.S. at 132). Both Nishikawa and the government agreed that "*no* conduct results in expatriation unless the conduct is engaged in voluntarily." 356 U.S. at 133 (emphasis in original).[29] The issue before the Court was whether, as Nishikawa contended, the government was required to prove the voluntariness of the expatriating act, or whether, as the government contended, it could rely on "the ordinary rule that duress is a

[29] The parties in *Nishikawa* also agreed that the government had the burden of proving by "clear, convincing and unequivocal evidence" that an expatriating act had taken place. 356 U.S. at 133. This agreement reflected this Court's decision three years earlier in *Gonzales* v. *Landon*, 350 U.S. 920 (1955), in which the Court announced, in a two-sentence per curiam opinion, that it was "of the view that the standard of proof required in denaturalization cases * * * is applicable to expatriation cases." *Gonzales* left open the question whether that standard overrode the general rule that acts were presumed to have been done voluntarily—the issue presented by *Nishikawa*.

matter of affirmative defense and * * * that the party claiming that he acted involuntarily must overcome a presumption of voluntariness." 356 U.S. at 134.

This Court concluded that "[b]ecause the consequences of denationalization are so drastic [Nishikawa's] contention as to burden of proof of voluntariness should be sustained," 356 U.S. at 134, and, moreover, that the government was required to prove voluntariness by "clear, convincing and unequivocal evidence." *Id.* at 135. It noted that denying the government's use of the presumption of voluntariness was "altogether consonant" with the legislative history of Section 401 (*ibid.*), and that in *Schneiderman* v. *United States*, 320 U.S. 118, 122 (1943), it had already adopted the clear and convincing evidence standard for denaturalization cases. *Nishikawa* v. *Dulles*, *supra*, 356 U.S. at 134-135.

Justice Harlan dissented, preferring "the general rule that consciously performed acts are presumed voluntary" (356 U.S. at 144). He explained (*id.* at 145-146):

> One of the prime reasons for imposing the burden of proof on the party claiming involuntariness is that the evidence normally lies in his possession. This reason is strikingly applicable to cases of the kind before us, for evidence that an individual involuntarily served in a foreign army is peculiarly within his grasp, and rarely accessible to the Government. * * * In such circumstances it seems to me the better course to require Nishikawa to prove his allegation of duress rather than to impose on the Government the well-nigh impossible task of producing evidence to refute such a claim.

Three years later, the House Judiciary Committee proposed what is now Section 1481(c) to overturn *Nishikawa* and to adopt the views of Justice Harlan's dissent. H.R. Rep. No. 1086, 87th Cong., 1st Sess. 40-41 (1961). The committee was "willing to accept the rationale of a considerable body of judicial decisions that no conduct results in expatriation unless such conduct is engaged in voluntarily." *Id.* at 40. The committee stated that "[i]t is more difficult, however, to subscribe" to *Nishikawa's* holding that the government bears the burden of proving voluntariness by clear and convincing evidence. *Ibid.* Instead, the committee "was impressed by the * * * statements contained in Justice Harlan's * * * dissenting opinion." *Id.* at 41. Accordingly, it concluded (*ibid.*):

> In order to forestall further erosion of the statute designed to preserve and uphold the dignity and the priceless value of U.S. citizenship * * * the amendment [now Section 1481(c)] sets up rules of evidence under which the burden of proof to establish loss of citizenship by preponderance of the evidence would rest upon the Government. The presumption of voluntariness under the proposed rules of evidence, would be rebuttable—similarly—by preponderance of the evidence, thus leaving undisturbed the body of

judicial decisions in which it is held that expatriation shall not occur if involuntariness, duress, or compulsion is established in rebuttal of the Government's contention that expatriation was voluntary.

Congress was thus able to overrule *Nishikawa* because that decision derived, not from the Constitution, but from this Court's own determination of the appropriate standard of proof where legislative guidance was absent. The Court's opinion in *Nishikawa* nowhere referred to any provision of the Constitution; indeed, it examined the legislative history of the Immigration and Nationality Act and noted that the standard it was announcing was consistent with that history (*Nishikawa* v. *Dulles*, *supra*, 356 U.S. at 135), an observation that would have been quite unnecessary had the Court believed that Congress was without power to determine the burden of proof. And the Court stated that it was applying the "same principle" it had applied to denaturalization cases in *Schneiderman* v. *United States*, *supra*, where it had observed that "[o]ur concern is with what Congress meant by" the predecessor to the 1940 Act. 320 U.S. at 119-120.[30]

Section 1481(c) recognizes, as the committee made clear, that no act can be expatriating unless it is done voluntarily; the statute simply provides that

[30] The House Committee remarked that its proposed amendment applied only to expatriation cases and that the *Schneiderman* standard should be "left undisturbed" for denaturalization cases. H.R. Rep. No. 1086, *supra*, at 40.

voluntariness will be presumed until the party resisting a finding of expatriation proves the contrary by a preponderance of the evidence. As Mr. Justice Harlan observed in *Nishikawa*, this is the common law rule, even in criminal cases. It is also a rule that enhances the truth-finding process, since it is often difficult if not impossible to refute a claim that an act was performed under duress.

It is worth noting at this point that it is not invariably the government that seeks to prove expatriation. In some cases an individual claims that he has been expatriated, and the government claims that he is still a citizen. See, *e.g.*, *Kawakita* v. *United States*, 343 U.S. 717 (1952); *United States* v. *Lucienne D'Hotelle*, 558 F.2d 37, 40 (1st Cir. 1977); *United States* v. *Matheson*, *supra*. Thus the statute does not *a priori* favor governmental interests over private ones. It is facially neutral.[31]

B. *Afroyim* Did Not Consider the Presumption or Burden of Proof Issues Addressed by Section 1481(c)

Article I, Section 8, clause 9 of the Constitution grants Congress power to establish federal courts, and Congress may define the rules of evidence and procedure that govern trials in those courts. See *Tot*

[31] To be sure, the House Committee's report speaks of "the Government" having the burden of proving expatriation and "the Government's" contention that expatriation was voluntary. H.R. Rep. No. 1086, *supra*, at 41. But the language of the statute itself shows that Congress was careful to place the burden on the party claiming expatriation, not the government as such.

v. *United States*, 319 U.S. 463, 467 (1943); *Palermo* v. *United States*, 360 U.S. 343, 347-348 (1959); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 31 (1976). Congress exercised this power in enacting Section 1481(c). H.R. Rep. No. 1086, *supra*, at 41. *Afroyim* neither stated nor implied that any particular standard or burden of proof was constitutionally required in deciding whether a citizen has voluntarily relinquished his citizenship. The court below nonetheless concluded that to uphold the preponderance test and the presumption of voluntariness of Section 1481 (c) "would be to grant indirectly to Congress power over an individual's citizenship that *Afroyim* held it could not exercise directly" (J.S. App. 10a; footnote omitted).

This reasoning assumes that, because Congress cannot impose expatriation on a citizen, it therefore lacks power to prescribe rules of evidence for determining, in a judicial proceeding, whether expatriation has taken place. The conclusion does not follow from the premise, unless one reads the court of appeals' opinion as holding that no citizen can be expatriated once he resists or protests expatriation in litigation. But it is plain enough that the court was saying no such thing, for it remanded the case to the district court to determine if the government had proven appellee's expatriation by clear and convincing evidence. Such a disposition contemplates that appellee may yet be expatriated, his protest notwithstanding.

The court of appeals' conclusion that *Afroyim* precludes Congress' power to set rules of evidence as it

had done here ignores two aspects of the *Afroyim* opinion, as well as its holding. First, the Court there quoted, at length and with evident approval, the remarks of Representative Van Trump of Ohio who, in 1863, had proposed a bill that, in the Court's words, "went no further than to provide a means of evidencing a citizen's intent to renounce his citizenship" (387 U.S. at 265). In defending his bill, Representative Van Trump stated that, while only the citizen and not the government had power to expatriate, "the evidence of [the citizen's] election to exercise his right * * * is the legitimate subject matter of legislation." *Ibid.*[32]

Moreover, Justice Black, who wrote the Court's opinion in *Afroyim*, had concurred in *Nishikawa* because he believed that no citizen could be involuntarily expatriated (a view that later prevailed in *Afroyim*). In doing so, however, he had observed:

> Of course a citizen has the right to abandon or renounce his citizenship and Congress can enact measures to regulate and affirm such abjuration. But whether citizenship has been voluntarily relinquished is a question to be determined on the facts of each case after a judicial trial in full conformity with the Bill of Rights. *Although Congress may provide rules of evidence*

[32] As the Court noted in *Afroyim*, Representative Van Trump's bill was defeated, apparently because of the then-prevailing belief that Congress had no power to legislate, even to that limited extent, on matters of expatriation. See *Afroyim* v. *Rusk*, *supra*, 387 U.S. at 265 n.20. But there is no indication that the Court in *Afroyim* shared that belief.

> *for such trials*, it cannot declare that * * * equivocal acts * * * establish a conclusive presumption of intention to throw off American nationality.

Nishikawa v. *Dulles*, *supra*, 356 U.S. at 139 (Black, J., concurring; emphasis added).

There is no indication in Justice Black's opinion for the Court in *Afroyim* that he was retreating from his statement in *Nishikawa* that "Congress may provide rules of evidence" for trials to determine whether citizenship has been voluntarily relinquished. Of course, one cannot necessarily ascribe to the Court in *Afroyim* the views expressed in Justice Black's concurring opinion in *Nishikawa*, for *Afroyim* did not present the question whether Congress could provide such rules of evidence. But surely there is no warrant in *Afroyim* for going to the opposite extreme, as the court of appeals here did, finding in *Afroyim* an implicit *rejection* of Congress' power to provide such rules of evidence.

But even aside from the language in *Afroyim*, its holding demonstrates that it does not control the issue here. *Afroyim* established a principle of constitutional law—that the Fourteenth Amendment creates a citizenship for the native-born and the naturalized that Congress cannot take away. At the same time, however, *Afroyim* clearly recognized the well-established view in the United States [33] that the citizen retains an inherent power to surrender his citizenship. 387

[33] See note 8, *supra*.

U.S. at 268. In this area of the law as in many others, it is certainly to be expected that an individual such as appellee may perform an act that appears to have legal consequences and then later claim, in the course of litigation, that the act has no such consequences at all. In this respect, appellee is no different from a person who appears to have entered into a contract and later claims that he did not do so or that the contract is not binding. Rules of evidence must be established and followed to enable a court to go about deciding who is right. To recognize the legal principle that a person is bound by the contracts he enters into says nothing about how the parties go about proving, and how the court goes about deciding, whether the contract was made. So here, to accept the principle of *Afroyim* that a citizen cannot lose his citizenship unless he voluntarily relinquishes it says nothing about how to determine whether the citizenship has in fact been voluntarily relinquished. That is the point that Section 1481(c) addresses.

The remaining question, therefore, is not whether Congress is prohibited by the Fourteenth Amendment from adopting standards for citizenship adjudications, but whether the standards enacted in Section 1481(c) are permissible under those provisions of the Constitution that govern adjudications affecting individual and governmental interests as important as citizenship. It is to that question that we now turn.

IV. THE BURDEN OF PROVING EXPATRIATION BY A PREPONDERANCE OF THE EVIDENCE DOES NOT VIOLATE DUE PROCESS

In our view, the power of Congress to prescribe rules of evidence and burdens of proof (see pages 63-64, *supra*) in expatriation cases is limited not by the Citizenship Clause of the Fourteenth Amendment, but by the Due Process Clause of the Fifth Amendment. Cf. *Tot* v. *United States*, 319 U.S. 463, 467-468 (1943); *Leary* v. *United States*, 395 U.S. 6, 29-36 (1969) (presumptions in criminal cases); *In re Winship*, 397 U.S. 358, 364 (1970) (burden of proof in criminal cases); *Addington* v. *Texas*, No. 77-5992 (Apr. 30, 1979), slip op. 6-8 (burden of proof in civil commitment proceedings). The provisions of Section 1481(c) fully satisfy due process requirements.

The statute in no way limits the right of one who has arguably expatriated himself to a full hearing and a judicial determination of his citizenship. That right is recognized in 8 U.S.C. 1503. Section 1481(c) simply allocates the burden of proof among the parties and sets the standard of proof that the court must follow. See page 22, *supra*. Both the standard of proof and the presumption of voluntariness are appropriate to the adjudication of expatriation and are faithful to evidentiary principles of long standing that cannot be considered arbitrary or unreasonable. In this Part, we consider the statute's requirement that the party claiming loss of nationality must prove the expatriating act by a preponderance of the evidence.

The court below substituted a standard of "clear, convincing and unequivocal evidence" (J.S. App. 14a). We recognize that this Court has, in this area, stated a judicial preference for this standard of proof. See *Nishikawa* v. *Dulles*, *supra* (expatriation); *Schneiderman* v. *United States*, *supra* (denaturalization); see also *Woodby* v. *INS*, 385 U.S. 276, 285 (1966) (deportation). But, as previously discussed (see page 62, *supra*), *Nishikawa* and *Schneiderman* did not purport to establish a constitutional rule requiring such a standard; rather, they created a standard in areas Congress had not addressed. Likewise, *Woodby* did not purport to be constitutionally based. It adopted the "clear, unequivocal, and convincing evidence" only after ascertaining that—unlike the present case—Congress had not addressed the degree of proof for deportation proceedings but rather had "left [it] to the judiciary to resolve." 385 U.S. at 284.[34]

Of course, there are instances in which the Due Process Clause does impose requirements of proof in excess of the preponderance standard. This Court has held that the Constitution requires proof beyond a reasonable doubt for criminal convictions and delinquency adjudications. *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358

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[34] Indeed, in citing *Nishikawa* for the proposition that the court had required clear, unequivocal and convincing evidence in expatriation cases, the Court in *Woodby* added: "But see § 349 of the Immigration and Nationality Act, 75 Stat. 656 (1961), 8 U.S.C. § 1481(c)." 385 U.S. at 285 n.17.

(1970). Moreover, as the Court recently held in *Addington* v. *Texas*, No. 77-5992 (Apr. 30, 1979), the loss of liberty occasioned by involuntary and indefinite civil commitment to a mental hospital is so substantial that the state must present clear and convincing evidence of mental illness and a need for hospitalization.

We have no doubt that a citizen's interest in retaining his citizenship is of the highest order, comparable to that in retaining his liberty against imprisonment or involuntary civil commitment. See *Addington* v. *Texas*, *supra*, slip op. 13-14. If Congress' power to expatriate a citizen were commensurate with its power to revoke the naturalization of one who has procured it by fraud (see *Schneiderman* v. *United States*, *supra*), or its power to deport an alien (see *Woodby* v. *INS*, *supra*), or with the state power to commit a citizen to a mental hospital (see *Addington* v. *Texas*, *supra*), a respectable argument could be made that the magnitude of the citizen's interest, especially when weighed against the strength of the societal interest in inflicting the sanction (see *Addington* v. *Texas*, *supra*, slip op. 6-7), requires that expatriation not be adjudged without clear and convincing evidence of the facts that allow it. This indeed is the concern that prompted this Court's decision in *Nishikawa*, when it assumed that Congress did have such a power (although, as noted above, the Court did not rest its decision on a constitutional plane). But, as *Afroyim* established, Congress cannot expatriate a citizen. Only the citizen

himself can do that, and then only if he has voluntarily committed one of the narrow class of actions that Congress has designated and that show a transfer of allegiance.

The focus of an expatriation case therefore is significantly different than that of criminal, denaturalization or deportation cases, or of civil commitment proceedings. For one thing, the purpose of the expatriation inquiry is not to determine whether the court should impose a sanction on the defendant, such as imprisonment, involuntary confinement, banishment from the United States or other significant loss of liberty. It is merely to determine the individual's legal status, based upon his own voluntary acts—that is, whether he has already expatriated himself. A judgment of expatriation does not place any new or independent burden on the individual or the United States; it recognizes formally what has already occurred. Expatriation proceedings are thus similar to other "status" determinations, such as paternity proceedings, in which the individual may have a significant interest in avoiding a judicial declaration that he occupies a particular status, yet the burden of proof is a preponderance of the evidence. *See e.g.*, *Huntingdon* v. *Crowley*, 64 Cal. 2d 647, 414 P.2d 382, 51 Cal. Reptr. 254 (1966); *State ex rel. Brown* v. *Middleton*, 259 Iowa 1140, 147 N.W. 2d 40 (1966). Moreover, expatriation has no stigma attached to it; unlike a finding of, *e.g.*, criminal activity, mental illness, or fraud in the procurement of citizenship, commission of an expatriating act, such as naturalization in a foreign country, is not inher-

ently socially reprehensible. See *Addington* v. *Texas*, *supra*, slip op. 7. Indeed, as we noted at the outset of our argument (see pages 16-21, *supra*), expatriation is a basic freedom long recognized in this country, and in expatriation proceedings it is sometimes the individual, not the government, who contends that expatriation has occurred.

Thus, the concern that the judicial process not impose a harsh result on a litigant unjustly—the concern that has led to an exacting burden of proof in criminal, deportation and other proceedings—is satisfied in expatriation cases not by the standard of proof, but by the substantial protection inherent in the very concept of expatriation. We do not suggest any denigration of the citizen's interest in keeping his citizenship. To the contrary, that interest is so great that the government cannot take citizenship away under *any* standard of proof. But that very constitutional principle serves to narrow the inquiry in an expatriation case and substantially minimizes the possibility that the citizen's retention of his citizenship will depend on the standard of proof involved.

It is easy to answer this argument by saying that a judgment of expatriation is just as final and just as severe as a judgment of denaturalization or, indeed, as the judgment of expatriation was to Nishikawa when this Court decided his case in 1958. It is, in fact, too easy to answer it that way; such an answer overlooks the fundamental change in the expatriation concept that *Afroyim* established. By striking down Congress' putative power to take away

citizenship for an equivocal act, this Court ensured that no court would ever be called upon to decide whether expatriation was to be inflicted on a citizen and thus eliminated the need for a heavy burden of proof.

We should note in this regard that if the Court disagrees with our previous submission and holds that specific intent is a requirement of expatriation (see Part II, *supra*), then the burden on the government of the court of appeals' "clear, convincing and unequivocal" standard of proof would be substantially magnified. To prove specific intent by clear and convincing evidence is extremely difficult, if not impossible, for it would be a rare litigant who could not produce some story—much like appellee produced in the district court—to explain why actions that appear to have been done to sever allegiance to the United States were in fact motivated by other considerations (*e.g.*, tax relief or avoidance of military service) or were the product of confusion, absentmindedness, haste or a host of other factors. As Justice Frankfurter pointed out in his concurring opinion in *Nishikawa* (356 U.S. at 141; citation omitted):

> Much more difficult [than establishing the commission of an expatriating act] would it be for the Government to establish the citizen's state of mind as it bears on his will, purpose and choice of action—in short, "voluntariness." According to the ordinarily controlling principles of evidence, this would suggest that the indi-

> vidual, who is peculiarly equipped to clarify an ambiguity in the meaning of outward events, should have the burden of proving what his state of mind was. Moreover, any other evidence of his state of mind, outside of his own mental disclosures, will often be found only abroad, where the Government may have no facilities for conducting the necessary investigation. The Court should hesitate long before imposing on the Government, by a generalized, uncritical formula, a burden so heavy that the will of Congress becomes incapable of sensible rational, fair enforcement.

This Court faced much the same problem in *Lavine* v. *Milne*, 424 U.S. 577 (1976), and rejected the constitutional argument that the burden be placed on the state to prove that a welfare applicant left his last job with intent to make himself eligible for benefits. The Court recognized that an "applicant's motive should best be known by the applicant himself." *Id.* at 585. More recently, the Court remarked in *Addington* v. *Texas*, *supra*, that a key consideration in determining whether to apply a rigorous standard of proof is whether the difficulty inherent in meeting such a standard would raise "a serious question as to whether a state could ever prove" the facts necessary to reach a legitimate and socially necessary result.[35] Slip op. 11. We submit

[35] The difficulty is enhanced in expatriation cases because the relevant conduct often occurs, as it did in this case, outside the United States and years before its legal effect is litigated in the courts in this country. Cf. *Fiallo* v. *Levi*, 406 F. Supp. 162, 167 (E.D. N.Y. 1975), aff'd, 430 U.S. 787 (1977).

Under 8 U.S.C. 1503, an action to determine nationality must be brought within five years of an administrative denial of any "right or privilege as a national of the United States * * *," but there is no time limit on the initial assertion of such a right or privilege.

that neither the Fifth Amendment nor the Fourteenth Amendment requires that those who renounce their citizenship or take an oath of allegiance to another country should be allowed to reclaim the benefits of citizenship if the government fails to prove, clearly and convincingly, that their present statements of past intention are incorrect.

By the same token, if the Court agrees with us that specific intent is not required in expatriation cases, then the burden of proving expatriation by clear and convincing evidence would assume more tolerable proportions. As we see the task in that situation, the government would be required to prove the commission of the expatriating act by clear and convincing evidence; that issue is "basically factual and therefore susceptible of objective proof" in a way that specific intent is not. See *Addington* v. *Texas*, *supra*, slip op. 13. We do not concede that the statutory burden of proof would be unconstitutional in such circumstances, for we believe, as stated above, that the protection afforded the citizen by the concept of expatriation itself makes the statutory standard (which is, of course, the burden of proof normally applicable in civil proceedings) an appropriate and constitutional one. We do acknowledge, however, that if specific intent is not an element of expatria-

tion, the clear and convincing evidence standard would pose a significantly diminished threat to the vindication of the government's legitimate interests in determining who is a citizen and who is not.

V. THE STATUTE'S PRESUMPTION OF VOLUNTARINESS IS CONSTITUTIONAL

Once an act is shown to have been done, Section 1481(c) creates a presumption that it was done voluntarily. The presumption is rebuttable, however; the party resisting a finding of expatriation (usually, but not always, the individual) may disprove voluntariness by a preponderance of the evidence. Compare *Morissette* v. *United States*, 342 U.S. 246 (1952); see *Sandstrom* v. *Montana*, No. 78-5384 (June 18, 1979), slip op. 11-12. Like the statute's standard of proof, this presumption was enacted to overcome the contrary rule established in *Nishikawa* v. *Dulles*, *supra*, and to adopt the view of Justice Harlan's dissent in that case: that the burden of proof should lie on the party claiming involuntariness because "the evidence normally lies in his possession." H.R. Rep. No. 1086, *supra*, at 41, quoting *Nishikawa* v. *Dulles*, *supra*, 356 U.S. at 145 (Harlan, J., dissenting). See also *Nishikawa* v. *Dulles*, *supra*, 356 U.S. at 141 (Frankfurter, J., concurring); *Lavine* v. *Milne*, *supra*, 424 U.S. at 585.

We note at the outset that the statutory presumption was unnecessary to the determination of voluntariness in this case, for appellee never claimed that his oath of allegiance to Mexico had been given under duress, and appellee's own statements unquestionably

provided adequate reason for the district court to find that he had taken the oath of his own free will. See page 55, *supra*. Nonetheless, Section 1481(c) creates a mandatory rather than a permissive presumption, for "it tells the trier that he or they *must* find the elemental fact [*i.e.*, voluntariness] upon proof of the basic fact [*i.e.*, the commission of the act], at least unless the [individual] has come forward with some evidence to rebut the presumed connection between the two facts." *Ulster County Court* v. *Allen*, No. 77-1554 (June 4, 1979), slip op. 16 (emphasis in original). See also *Sandstrom* v. *Montana*, *supra*, slip op. 4. And we are mindful that, at least in criminal cases, this Court "has held it irrelevant in analyzing a mandatory presumption * * * that there is ample evidence in the record other than the presumption to support a conviction." *Ulster County Court* v. *Allen*, *supra*, slip op. 18. Therefore, assuming *arguendo* that the strict standards this Court has fashioned for evaluation of presumptions in criminal cases apply to this case, we examine the validity of Section 1481(c)'s presumption on its face.[36]

Regardless of whether a presumption is to be treated on its face or as applied to the particular facts of a given case, the question is whether the pre-

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[36] Even as to mandatory presumptions in the criminal law, the inquiry is whether the presumption is accurate "in the run of cases." *Ulster County Court* v. *Allen*, *supra*, slip op. 18. "This Court has never required that a presumption be accurate in every imaginable case" even where facial analysis is appropriate. *Id.* at 14 n.14.

sumption is rational.[37] A statutory presumption is consistent with the Due Process Clause if there is a "rational connection between the fact proved and the ultimate fact presumed." *Tot* v. *United States*, *supra*, 319 U.S. at 467. The presumption violates due process, on the other hand, if "the inference of the [ultimate or "elemental" fact] from proof of the [evidentiary or "basic" fact] is arbitrary because of lack of connection between the two in common experience." *Id.* at 467-468 (footnote omitted). As the Court reiterated the test in *Leary* v. *United States*, 395 U.S. 6, 36 (1969), "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend" (footnote omitted). See also *Ulster County Court* v. *Allen*, *supra*, slip op. 21.

We think it may be said with substantial assurance that it is more likely than not that a person who commits an act commits it voluntarily. "[C]ommon sense and experience" (*Barnes* v. *United States*, 412

[37] In the criminal area, of course, special concerns attend, for the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 364 (1970); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). The use of presumptions is not forbidden, but, if the presumed fact is an element of the crime, it must be said with substantial assurance to follow from the "basic" fact beyond a reasonable doubt in order to be valid. Cf. *Barnes* v. *United States*, 412 U.S. 837, 845-846 (1973).

U.S. 837, 845 (1973)) tell us that a person usually does what he does of his own free will, rather than unconsciously, accidentally or under duress. This simple fact is sufficient to sustain the presumption.[38]

Section 1481(c) thus does no more than implement what has always been a recognized precept of the common law. Cf. *Barnes* v. *United States*, *supra*, 412 U.S. at 843-845. Its validity is evident, we believe, regardless of this Court's conclusion as to the constitutionality of proving expatriation by clear and convincing evidence. The obvious and unassailable rationality of the presumption, combined with the individual's opportunity to rebut the presumption by a preponderance of the evidence, satisfies the Due Process Clause.

[38] We recognize, of course, that the Court declined to apply the presumption in *Nishikawa* v. *Dulles*, *supra*, not because it had any doubts as to its validity in the great majority of cases, but "[b]ecause the consequences of denationalization are so drastic." 356 U.S. at 134. A different result obtains here, for two reasons. First, Congress has overridden the Court's discretion to formulate rules of evidence by formulating its own. See pages 61-62, *supra*. Second, *Afroyim* removed the animus of the Court's decision in *Nishikawa* by effectively declaring that the government has no power to denationalize a citizen.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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